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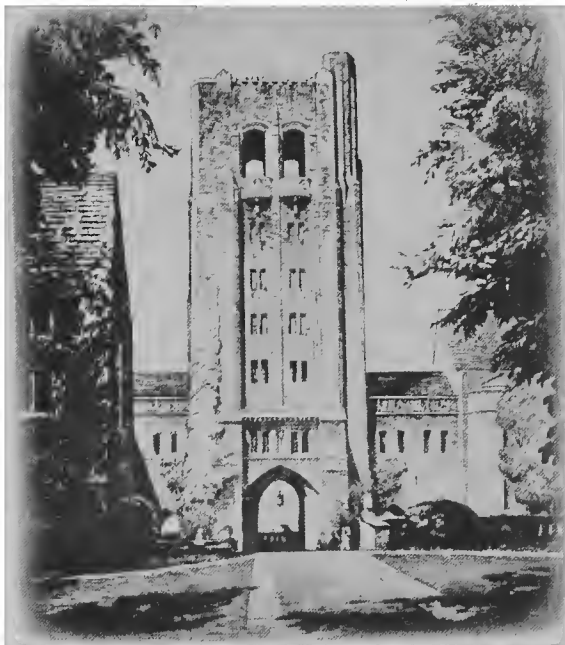
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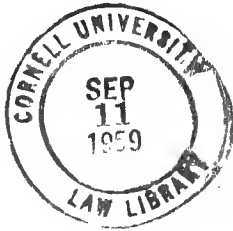
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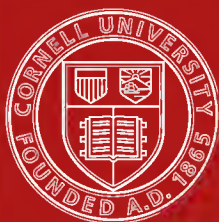
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COMMERCIAL LAW CASES

VOLUME TWO

PERRIN AND BABB

COMMERCIAL LAW CASES

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IN TWO VOLUMES

VOLUME TWO

NEGOTIABLE INSTRUMENTS
PARTNERSHIP—CORPORATIONS



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PREFACE

The divisions of the law contained in this volume, Negotiable Instruments, Partnership, and Corporations, comprise the subjects ordinarily taken up in the second year of legal study, after the student has become familiar with the principles embodied in the general law of contracts and agency, and, particularly, after he has attained to some conception of the method of legal reasoning. Perhaps the most difficult task confronting the instructor at the outset is the inculcation of the principles underlying the orderly advance of logical argument. The successful completion of the first year's work presupposes that these have been, to some degree at least, assimilated; and more time may now be devoted—as, indeed, the exigencies of these subjects require—to correspondingly broader range of illustration.

In a work of this size, designed for the purpose already set out, it is, of course, impracticable to do more than set forth the basic principles upon which the law of Negotiable Instruments, Partnership and Corporations, rests. Only those principles which the authors deem fundamental have been included, but it is believed that in so far as particular problems are opened up by the text, the law with reference thereto has been stated as fully as is compatible with the size of the book. The more obscure parts of each of these vast subjects are, however, left wholly untouched and the task of dealing therewith devolves upon the individual instructor. Especially is this true of Negotiable Instruments and of Corporations; in the former, because of the inherent difficulty of ascertaining from a code what the law is, and how sections, apparently conflicting with other sections, or repugnant to reason, are to be reconciled; in the latter, because of the intricate ramifications of corporation law, grounded in part, it may be, on the same generic uncertainty as to the precise lines of demarcation contemplated by the legislature, in part on the great and increasing number of corporations, each conducting its own affairs in accordance with individual aspirations, yet organized and existing under the same, or similar, organic law.

It is the hope of the authors that their treatment of these complex subjects may commend itself to teachers of the law, and to the legal profession, as an attempt to bring the elements of this

intractable material into a form not wholly incomprehensible, under competent instruction, to students in their second year of legal study.

Boston,
September 1, 1921.

H. L. P.
H. W. B.

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COMMERCIAL LAW CASES

VOLUME TWO

COMMERCIAL LAW CASES

Chapter V.

NEGOTIABLE INSTRUMENTS.

Bills, notes and checks, known as negotiable instruments, differ somewhat from other contracts for the reason that the law concerning them springs from different and independent sources. The law of contracts, already considered, had its origin in the common law of England, while the law of negotiable instruments arose largely out of the customs of merchants, who formulated a body of usages and rules relating to trade which were gradually adopted into the law by the courts. Bills of exchange and promissory notes early acquired among merchants the peculiar quality of being negotiable. Negotiability implies that a third person may become a party to the contract without any direct dealings with the original contracting parties, if the instrument has come into his hands under certain conditions. This idea of negotiability, the underlying principle of the law merchant, is, of course, foreign to the conception underlying other contracts.

At the present time, the law relating to negotiable instruments has been codified in many states, which have agreed upon a Uniform Negotiable Instruments Law. This chapter will deal almost wholly with the statute, because practically all the great commercial states have adopted it, and because it differs from the earlier law only in occasional details

I.

GENERAL PRINCIPLES.

In order to be negotiable, the instrument must conform to the following requirements:

1. It must be in writing, and must be signed by the maker or drawer.
2. It must contain an unconditional promise or order to pay a certain sum of money.

The promise is unconditional although it is coupled with the indication of a particular fund from which the money is to be paid. It may contain a statement of the transaction which gives rise to the instrument, but a promise to pay out of a particular fund only makes the instrument conditional.

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable, except that it may:

- a. Authorize the sale of collateral security in case the instrument is not paid at maturity.
 - b. Authorize a confession of judgment if the instrument is not paid at maturity.
 - c. Waive the benefit of any law intended for the advantage of the person making the instrument.
 - d. Give the holder the election to require something to be done instead of the payment of money.
 - e. Be made payable by instalments, with a provision that upon default in any instalment, the whole shall become due.
 - f. Be made "with exchange."
 - g. Be made with costs of collection or an attorney's fee for collection.
3. A negotiable instrument must be payable on demand or at a fixed future date. This includes:
- a. At a fixed period after date or sight.
 - b. On or before a fixed or determinable future time specified.
 - c. On or at a fixed future period after the occurrence of a specified event which is certain to happen, although the time of happening is uncertain. An instrument payable upon a contingency is not negotiable, and the happening of such a contingent event will not cure the defect.
 - d. It must be payable to the order of a specified person or to bearer.

The instrument is payable to order when drawn to a specified person or his order, whether made payable to the order of the maker himself, to a payee or payees, to joint payees or to the holder of an office. When the instrument is payable to order, the payee must be named or otherwise indicated with reasonable certainty.

The instrument is payable to bearer:

1. When this is expressly stated.
2. When payable to a person named therein or bearer.

3. When payable to the order of a fictitious or nonexistent person, when such fact is known to the person making it so payable.
4. When the name of the payee does not purport to be the name of any person.
5. When the only or last indorsement is an indorsement in blank.

The instrument need not follow any particular language and is not invalid if it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person receiving such an instrument takes it as of the date of delivery. When no time for payment is expressed, the instrument is payable on demand. When an instrument, payable at a fixed period after date, is undated, the holder may put in the true date and the instrument is payable accordingly. When the instrument is lacking in any material particular, the person in possession of it has *prima facie* authority to complete it by filling up the blank. This is true although the instrument originally contained nothing but the name of the maker.

Every negotiable instrument is incomplete and revocable until the delivery of the instrument for the purpose of giving effect to it. As between the immediate parties and parties other than holders in due course, the delivery must be under authority. This authority may be conditional and for a special purpose only, but when such an instrument is in the hands of a holder in due course a valid delivery is conclusively presumed.

The statute contains certain rules for the construction of ambiguous instruments:

1. When there is a discrepancy between words and figures, the sum denoted by the words is final, but if the words are uncertain, then reference may be had to the figures.
2. When the instrument provides for the payment of interest without specifying the date from which the interest shall run, the interest runs from the date of the instrument, or if it is undated, from the issue.
3. When there is a conflict between written and printed provisions, the written provisions prevail.
4. When the signature is so placed upon the instrument that it is not clear in what capacity the person making it intended to sign, he is in most states deemed an indorser.
5. When an instrument containing the words "I promise to pay," is signed by two or more persons, they are jointly and severally liable.

The signature of any party may be made by a duly authorized agent without any particular form of appointment. In such event, a person signing as agent is not bound if he has been legally authorized. The mere addition of words describing the signer as an agent, however, will not exempt him from personal liability.

Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose name appears thereon is presumed to have become a party thereto for value. Consideration may be anything that will support a simple contract and may include a pre-existing debt.

A. Requisites of Negotiability.

1. The Law Merchant.

Goodwin v. Robarts. L. R. 10 Ex. 337.

Goodwin bought Russian Government scrip payable to bearer through Clayton, a broker, who pledged it with the defendants, a banking firm, as security for a loan to himself. Clayton became bankrupt and absconded, whereupon the defendants sold the scrip in the market. Goodwin sues to recover the amount realized, claiming title to the scrip.

Held, that an innocent purchaser acquires good title to a negotiable instrument properly negotiated to him.

Cockburn, J.

The substance of [the] argument is that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach.

Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by

the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become ingrafted upon, or incorporated into the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which courts of justice are bound to know and recognize."

Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated that Richard Malynes, a London merchant, who published a work called the *Lex Mercatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Richard II, C. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure*, 1 Cro. Jac. 6, in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607.

Savary, cited by Mons. Nouguiet, in his work "*Des lettres de change*," had assigned to it a later date, namely 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not.

In the meantime, promissory notes had also come into use, differing herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange had received the sanction of the courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

Another very remarkable instance of the efficacy of usage is to be found in much more recent times. The system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for money of the customer deposited with him, he gives credit in the account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque, which an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent. The banker, if he has funds, is bound to pay on presentation of a cheque on demand.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were

adopted into the law by our courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usage, adopted by the courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usage of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such.

2. Necessity of Promise or Order.

Gay v. Rooke. 151 Mass. 115.

Rooke made the following instrument:

"Marlboro', Sept. 23, 1881. I. O. U., E. A. Gay, the sum of seventeen dolls. 5-100, for value received. John R. Rooke."

Gay claims that this was a promissory note.

Held, that an acknowledgment of a debt is not a promissory note.

Devens, J.

In order to constitute a good promissory note there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law, founded on an acknowledged indebtedness, will not be sufficient. While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom. In this view the instrument sued on cannot be considered

a promissory note. It is an acknowledgment of a debt only, and, although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt, and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. A memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and due," signed by the maker and attested by a witness, [is] not a promissory note signed in the presence of an attesting witness within the meaning of the statute of limitations. In England, an I. O. U., there being no promise to pay embraced therein, is treated as a due bill only.

While in a few states it has been held otherwise, the law as generally understood in this country is that, in the absence of any statute, a mere acknowledgment of a debt is not a promissory note, and such is, we think, the law of this Commonwealth.

We have no occasion to comment upon those instruments in which words have been used or superadded from which an intention to accompany the acknowledgment with a promise to pay has been gathered, or where the form of the instrument fairly led to that conclusion. No such words exist in the instrument sued on, nor is it in form anything but acknowledgment. The words "for value received" recite indeed the consideration, but they add nothing which can be interpreted as a promise to pay.

3. Instrument Payable at All Events.

Cota v. Buck. 7 Metc. (Mass.) 588.

Pero indorsed to Cota the following instrument:

"New Ashford, March 13th, 1840. For value received, I promise to pay John Pero, or bearer, five hundred and seventy dollars and fifty cents, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said Pero, which is to be paid in the course of the season now coming.

Bushrod Buck."

Buck defends a suit by Cota for the amount due on the ground that this was not a negotiable instrument, and that hence Cota could not sue upon it.

Held, that a note payable at all events is negotiable.

Shaw, C. J.

The true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event. If it were payable on a contin-

gency, or out of a particular fund, it would not be negotiable. This note, we think, was payable by the promisor at all events, and within a certain limited time. The note is obscurely written and ungrammatical. But we think the meaning was this: that the signer, for value received in the purchase of property, promised to pay Pero or bearer the sum named, as soon as the termination of the coming season, and sooner, if the amount could be sooner realized out of the fund. Such reference to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute, and did not depend on the fund. So as to the time, whatever time may be understood as the "coming season," whether harvest time or the end of the year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment.

4. Act in Addition to Payment of Money.

Finley v. Smith. 165 Ky. 445.

Finley made a note to a bank containing a promise to furnish additional collateral if the collateral pledged to secure payment should depreciate. This note came into the hands of the plaintiff, who sues upon it as a negotiable instrument.

Held, that a promise to furnish additional security does not impair the validity of a negotiable instrument.

Carroll, J.

We are inclined to adopt the view that the conditions relied on as destroying the negotiable character of this note do not accomplish that purpose. The essential things pointed out in Section 1 of the act are: (1) That the instrument must be in writing, signed by the maker; (2) must contain an unconditional promise to pay a sum certain in money; (3) must be payable on demand or at a fixed future time; (4) must be payable to the order of a specified person or to bearer. And the independent promise in this note pledging the holder upon demand to put up additional collateral did not substantially affect any of these requirements. The promise to strengthen the collateral under penalty of the note maturing at once, did not change the date of its maturity any more than would the provision in a note payable in instalments that upon default in the payment of the instalment the whole should become due.

We think the promise to do an act in addition to the payment of money that will render the note not negotiable must be a promise that conflicts with some one of the essential characteristics of a negotiable note; or, as applied to the case in hand, it must be a promise to do something that would affect the unconditional promise contained in the body of the instrument at the time fixed for its maturity. The Negotiable Instrument Law, in Section 2, permits a

note to be made payable in instalments with a provision that upon default in the payment of any instalment the whole shall become due. Under this provision, if any instalment of a note payable in instalments at a fixed time is not paid, this delinquency precipitates the maturity of the note and thereby changes the time fixed for its maturity as certainly as does the stipulation that if the value of the collateral is impaired, other collateral should be supplied or else the note will become due.

It is quite usual to pledge collateral as security for the payment of a negotiable note, and we do not think that any narrow construction of the law should be adopted that would have the effect of impairing the use of this kind of security or that would deny to the holder the right to insist that if the value of the collateral deposited should become impaired, the maker must strengthen it or else precipitate the maturity of the paper. This condition in the note is merely supplementary to the fixed and controlling promises, and is really nothing more than additional security for the payment of the instrument. It is not, strictly speaking, "an order or promise to do an act in addition to the payment of money," but is rather an order or promise to do an act that will better secure the promise to pay the money stipulated at the time fixed in the note. If this condition or promise would disturb the negotiability of commercial paper, the effect would necessarily be to lessen the usefulness of collateral as security, because holders of paper would not be disposed to accept collateral, much of which has a fluctuating value, if they were denied the right to insist that its value should be maintained in an amount sufficient to serve the purpose for which it was accepted.

5. What Provisions are Additional to the Payment of Money under the Statute.

Bright v. Offield. 81 Wash. 442.

Bright, indorsee of a mortgage note made by James, seeks to hold the defendants as maker and indorsers. The note contained numerous provisions discussed in the opinion, and the defendants contend that these made it non-negotiable.

Held, that a negotiable instrument must not contain a promise to do anything in addition to the payment of money.

Ellis, J.

The appellants contend that the instrument in question is not negotiable because of the provisions of the negotiable instruments act. It is clear that if the note runs counter to that act, it is because of some of the following provisions found in [paragraphs] 1, 2, 3, 4, and 5, of the act (Laws 1899).

Sec. 3392. An instrument to be negotiable must conform to the following requirements:

[1. It must be in writing, and must be signed by the maker or drawer;]

2. Must contain an unconditional promise or order to pay a sum certain in money;

3. Must be payable on demand, or at a fixed or determinable future time.

Sec. 3393. The sum payable is a sum certain within the meaning of this act, although it is to be paid—

1. With interest; or

2. By stated instalments; or

3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fees, in case payment shall not be made at maturity.

Sec. 3394. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

2. A statement of the transaction which gives rise to the instrument.

Sec. 3395. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable—

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Sec. 3396. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

The appellants claim that the conditions in the note providing for an acceleration of maturity on certain contingencies render the note

non-negotiable. One decision holds that a mere recital in the note that it is of even date with a mortgage which is collateral to the note imports into the note all of the conditions contained in the mortgage and renders the note non-negotiable. According to what we believe to be the better rule, a mortgage securing a note, though referred to in the note but without expressly adopting its conditions, is merely ancillary to the note, and the conditions found in the mortgage alone will not change the character of the note as a negotiable instrument. The promise to pay is held to be a distinct agreement from the mortgage, and if couched in proper terms, the note is negotiable. This would seem to follow from the provision found in the third section of the negotiable instruments act, above quoted. The reference to the mortgage would be a mere "statement of the transaction which gave rise to the instrument."

Segregating the conditions contained in the note so as to consider their effect separately, the first we shall notice is this: "If default be made in the payment of any of said notes so secured, or any part of them, as the same mature, for the space of thirty days . . . then . . . the whole amount herein secured shall at once become due and payable." This and the provisions for payment "with exchange on New York" and for a reasonable attorney's fee in case of suit, are clearly covered by the second section of the act above quoted. They do not render the note non-negotiable.

Another condition is as follows:

"If the maker shall allow the taxes or any other public rates and assessments on the mortgaged property to become delinquent, or in case any taxes or assessments shall be levied against the holder on account of this note, then the whole amount herein secured shall at once become due and payable, and the mortgagee, its legal representatives or assigns, may proceed at once to collect these notes and foreclose the mortgage," etc.

It is urged that the provisions run counter to paragraphs 1 and 4 of the act, in that they render the note not "payable on demand or at a fixed or determinable future time," as provided in paragraph 1, and not payable "on or at a fixed period after the occurrence of a specified event, which is certain to happen," as the phrase "determinable future time" is defined in paragraph 4. It will be noted that the negotiable instruments act contains no express provision covering or declaring the effect of a stipulation in the note itself, accelerating the time of payment of the whole debt upon default of the maker in the payment of taxes upon the mortgaged property or upon the note itself. The last section of the act declares that in cases not covered by the act "the rules of the law merchant shall govern."

"The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time, or the event, for its ultimate payment, must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker,

or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day."

We are of the opinion that the second subdivision of paragraph 4 of the negotiable instruments act applies to notes in which the only time of payment is "on or at a fixed period after the occurrence of a specified event which is certain to happen," etc., and not to a note payable at all events at a time certain, but accelerated in maturity on the happening of a contingency. Considered only with reference to the time of payment, and without regard to the amount of payment, the provision of this note accelerating maturity on account of non-payment of taxes, etc., would not render the note non-negotiable. There is another phrase of this condition of the note, however, which makes the undertaking uncertain in the amount to be paid in case of acceleration of maturity by such delinquency of taxes. There is a clear and direct provision penalizing [the maker] if he does not pay them, and permitting the mortgagee, its legal representatives or assigns, to at once collect the note, and foreclose the mortgage, in which case the amount of recovery shall include all taxes, public rates or assessments that may be due thereon. Since the amount of these taxes, rates and assessments is uncertain, the amount of recovery would be uncertain. This provision renders the note a conditional promise to pay an uncertain sum.

The instrument further provides that, "if the maker shall do any act whereby the value of said mortgaged property shall be impaired," the whole amount shall at once become due and payable, and the mortgagee may proceed to collect the notes and foreclose the mortgage. This would authorize the holder of the note to proceed to collect the note and foreclose the mortgage upon the doing of any one of an almost infinite variety of things, such as suffering or committing waste, suffering the buildings to burn without replacing them, suffering a nuisance to be maintained upon the mortgaged or adjacent property, permitting undesirable tenants to occupy the premises, and many other things which might be suggested. It is, in effect, an undertaking to prevent these things, in addition to the payment of money. This provision is closely allied to a provision authorizing the holder of a note to declare it due at any time he may deem the debt insecure. Such a provision usually, and we think soundly, is held to destroy the negotiability of the note.

This instrument is a contract in which the maker has undertaken to do many things beside the payment of a sum certain in money. It is not a negotiable promissory note.

6. Instrument Payable Upon Condition.

Smilie v. Stevens. 39 *Vt.* 315.

The plaintiff, an indorsee, sues the maker of the following instrument:

"New York, Aug. 17th, 1865. I certify that James Smilie, Jr., has deposited with me five hundred dollars, payable to his order on demand with interest from February 15th, 1864, on the return of this certificate and my guarantee of his note to his brother John Smilie, dated February 15th, 1864, for the sum of five hundred dollars.

Simon Stevens."

Held, that a note payable upon a condition is not negotiable.

Peck, J.

The general rule on this subject is, that a promissory note or bill of exchange must be payable absolutely and not depend on a contingency, in order to come within the definition of a bill or promissory note so as to be negotiable. If the contingency depends on an event which necessarily must happen, so that the only contingency or uncertainty is as to time, it does not destroy the negotiability of the instrument. So too if the contingency as to the time of payment depends on an act to be done by the holder in reference to the instrument itself to hasten or fix the time of payment, as if a bill or note is made payable a given number of days after presentment and demand of payment, such contingency does not destroy its negotiability; as in such case the instrument imports an absolute indebtedness. The fact that the instrument in question is made payable "on the return of this certificate," is not such a contingency as affects its negotiable character. It is an act to be done with the instrument itself contemporaneous with the payment, and is no more than would be the implied duty of the holder of a negotiable note or bill in the absence of such stipulation; as it is the duty of the holder to deliver up a negotiable promissory note or bill on the payment of it by the maker, as a voucher for his security, or show a sufficient excuse for not doing so.

There is another contingency of a different character: the return of the maker's guarantee of the payee's note for \$500 to his brother, John Smilie. This contingency is collateral to the instrument in question, and depends on an act to be done by the payee, and on the performance of which the liability of the defendant depends. By the terms of this instrument the payee could have no remedy upon it till he had performed the condition, either literally or at least in some mode that would release the defendant from his liability on that guarantee. This the payee might never do, and the defendant might be compelled to pay the \$500 note he thus guaranteed, which payment would extinguish his liability on the paper in question. This is not a mere contingency as to the time of payment; it is a condition to be performed by the payee, and only on the substantial performance of which can any liability of the defendant, upon this instrument, arise. It is by the terms of the contract in question contingent, whether the defendant would ever become liable upon it.

An instrument having all the other requisites of a promissory note is not with such a condition, or subject to such a contingency, negotiable. If the plaintiff could show a special promise by the defendant to pay to him as assignee or indorsee, and show the condition performed, he might recover; but the declaration contains no such allegation. The declaration is insufficient for the reasons stated.

7. Instrument Payable Upon Event Certain to Happen.

McClenathan v. Davis. 243 Ill. 87.

The holder sues Davis as maker, and Elizabeth Gamble as indorser of the following note:

"For value received, I promise to pay Elizabeth Gamble, or order, the sum of fifteen hundred dollars in twelve months after I shall become the legal owner of one hundred and fifteen acres of land conveyed to me by my father, H. V. Davis, reserving to him, H. V. Davis, a life estate in said land, by which at his death I am to become possessed of and the owner in fee of said one hundred and fifteen acres, situated in the southeast corner of section 30, in township 18, north, range 11, east of the third P. M., Champaign County, Illinois.

Emmons Davis.

March 6th, 1894.

Witness: Thomas J. Smith.

Endorsed and payment guaranteed.—Elizabeth Gamble."

Davis defends on the ground that the note is payable upon a contingency, and hence is not negotiable.

Held, that a note is negotiable if a contingency specified is sure to occur.

Farmer, C. J.

Appellant's contention is that the instrument sued on is not a promissory note because it is not payable at a specified time which must certainly arrive, but is payable upon a contingency which may or may not happen. The contingency upon which it is argued the payment depends is the actual ownership and possession of the land by appellant, and it is said this may never happen, because it may be that the grantor in the deed had no title to the land, or that appellant might fail to record his deed and the grantor make another deed to an innocent purchaser, or that appellant might before the death of his father have joined with him in a conveyance to a third person, thereby destroying appellant's estate and interest in the land before the life estate of his father was terminated. We think there is no merit in this position of appellant. It is not claimed that there is any basis for the contention that it might possibly turn out appellant's

father had no title to the land conveyed, and as to the other alleged contingencies, it was in the power of appellant to prevent them happening. Besides, we do not consider them contingencies, within the meaning of the law, that could affect the certainty of the time for the payment of the instrument sued on. Properly analyzed and understood, that instrument recites that H. V. Davis had conveyed to appellant one hundred and fifteen acres of land, reserving a life estate therein; that appellant was to become the owner in fee and possessed of said land upon his father's death, and he promised to pay Elizabeth Gamble \$1500 within twelve months after he became such owner of said land—i. e., within twelve months after his father's death. The payment was not dependent upon a contingency that might never happen. The death of H. V. Davis would entitle appellant to the possession of the land, and his death was certain to happen. If the instrument was uncertain and ambiguous, which we think it is not, it is framed in the language of appellant and must be construed most strongly against him. Where the language of an instrument is susceptible of two constructions, one of which requires the performance of the impossible or involves a forfeiture or renders it unreasonable or unjust, the construction which makes a performance possible or avoids a forfeiture or is reasonable or just will be adopted. It seems to us it would be an absurd and unreasonable construction of this instrument to say that the parties did not understand or intend that the money was to be paid absolutely and within a definite, certain and fixed time.

8. Instrument Payable from Particular Fund.

First National Bank of Hutchinson, Kansas v. Lightner. 74 Kas. 736.

The Snyder Planing-mill Company agreed to build a barn for Lightner, who accepted two orders, both in substantially the following form:

“Hutchinson, Kan., August 10, 1903.

G. W. Lightner, Offerle, Kan.:

Dear Sir—Pay to the order of the First National Bank of Hutchinson, Kansas, \$1500, on account of contract between you and the Snyder Planing-mill Company.

The Snyder Planing-mill Company,
Per J. F. Donnell, Treasurer.

Accepted;
G. W. Lightner.”

The Mill Company negotiated these orders to the bank, which sues upon them. The defense is that they were not negotiable.

Held, that an instrument is negotiable although it indicates the fund to which payment is to be charged.

Porter, J.

The main controversy is whether the orders given by the planing-mill company to the bank and accepted by defendant are negotiable instruments. It is true that no specific time of payment is mentioned, but that does not affect their validity as such instruments; and, where no date is mentioned, they are payable on demand. Each of them, therefore, possesses all the essential elements of a bill of exchange, unless the words "on account of contract between you and the Snyder Planing-mill Company" make them payable out of a particular fund, and conditionally, so that the acceptance is thereby qualified.

The law is well settled that a bill or note is not negotiable if made payable out of a particular fund. But a distinction is recognized where the instrument is simply chargeable to a particular account. In such a case it is beyond question negotiable; payment is not made to depend upon the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of reimbursement. "A bill or note, without affecting its character as such, may state the transaction out of which it arose, or the consideration for which it was given."

So, also, the insertion into a bill or note of memoranda explaining the nature of the business or debt for which the instrument is given will not make it non-negotiable, for such a memorandum does not make the payment conditional.

The test in every case is said to be, "Does the instrument carry the general personal credit of the drawer or maker, or only the credit of a particular fund?" A promise to pay a certain sum "out of my next quarter's mail pay, which becomes due January 1, 1883," was held to be an absolute promise to pay a certain sum of money. An instrument promising to pay a certain sum, "being a portion of a value as under deposit in security for the payment hereof," [is] a promissory note payable at all events. An order which was to be charged "to freight" was held negotiable. A note expressed to be in payment of certain tracts of land was held negotiable. Likewise a note which stated that it was given in consideration of certain personal property, the title to which was not to pass unless the note was paid.

The mere fact that the consideration for which a promissory note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract, or promise on the part of the payee, will not destroy the negotiability of the note, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid.

The controversy is thus narrowed down to whether the words "on account of contract between you and the Snyder Planing-mill Company" amount to a direction to pay out of a particular fund, or,

on the other hand, are to be considered as simply indicating the fund from which the drawee, Lightner, might reimburse himself. Many of the cases attach but little importance to the words "account of" and give the same effect to them as to the words "out of."

We are of the opinion that these orders cannot be construed as drawn upon a particular fund. Beyond question there are many authorities which hold similar expressions to indicate an intention to charge a particular fund. The weight of authority and reason supports the proposition that the words amount to no more than an indication of the fund from which the drawee is to reimburse himself. The words used are substantially the same as though the orders read "and charge to account of contract with Snyder Planing-mill Company," or "credit to account of contract," etc.

9. Instrument Payable On or Before Date Specified.

Mattison v. Marks. 31 Mich. 421.

Marks made a note payable on or before a date named. The plaintiff sues upon it as a negotiable instrument.

Held, that a note may be payable on or before a certain day.

Cooley, J.

The objection to this instrument is, that it promises to pay a certain sum of money "on or before" a day named; and this, it is said, is not a promise to pay on a day certain, and consequently can not be a promissory note. It seems to us that this note is payable at a time certain. It is payable certainly, and at all events, on a day particularly named; and at that time, and not before, payment might be enforced against the maker. It is impossible to say that this paper makes the payment subject to any contingency, or puts it upon any condition. The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon sound reason, and we can discover no sound reason for the distinction here insisted upon.

10. Election of Holder to Require Something Other than Payment of Money.

Hodges v. Shuler. 22 N. Y. 114.

Hodges, the holder, sues Shuler and others as indorsers of the following instrument:

"Rutland and Burlington Railroad Company.

No. 253.

\$1,000.

Boston, April 1, 1850.

In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay in Boston, to Messrs. W. S. and D. W. Shuler, or order, \$1,000, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

T. Follett, President.

Sam Henshaw, Treasurer."

The defense is to the effect that this was not a negotiable instrument.

Held, that an election in the holder to require something other than the payment of money does not affect the negotiability of an instrument.

Wright, J.

The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock, and thus fulfill their promise in either of two specified ways; in such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the

promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of \$1,000 in four years from date, and its promise could only be fulfilled by the payment of the money, at the day named.

II. Instrument to be Payable in Money.

Thompson v. Sloan. 23 Wend. (N. Y.) 71.

A note made and dated at Buffalo, New York, for \$2500 was payable twelve months after date at the Commercial Bank in Buffalo in Canadian money. It was indorsed to the plaintiff who sues the maker and indorsers. The defendants claim that it is not a negotiable instrument because it is payable in the money of another country.

Held, that an instrument made, indorsed and payable in the United States, in a foreign commodity, is not negotiable.

Cowen, J.

Admitting that the note in question imports an obligation to pay in gold and silver, current in Canada, I do not see on what principle we can pronounce it to be payable in money, within the meaning of the rule. It is not pretended that coins current in Canada are, therefore, so in this state. As gold and silver they might readily be received; and so might the coin of any foreign country, Germany or Russia, for instance; but the creditor might, and in many cases doubtless would, refuse to receive them, because ignorant of their value. In law they are all collateral commodities, like ingots or diamonds, which, though they might be received, and be in fact equivalent to money, are yet but goods and chattels. A note payable in either would, therefore, be no more negotiable than if it were payable in cattle, or other specific articles. The fact of Canada coins being current here is not, at any rate, so notorious that we can judicially notice them as a universally customary medium of payment in this state; and if not, they are no more a part of our currency than Pennsylvania bank bills. Nor do I perceive in the case any proof, or offer to prove, that such coins were of universal currency.

This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such an instrument is to aver and prove the value of the sum expressed, in our own tenderable coin. It is payable in no other, whereas on the note in question, Canada money, a specific article, would be a lawful tender; Canada coppers, for aught I see, and,

under our own decisions, bank bills commonly current in Canada, would also be tenderable.

Nor is it necessary to deny that had this note been made, indorsed, and payable in Canada, it would have been negotiable.

B. When and to Whom Instrument is Payable.

1. No Time Specified.

McLeod v. Hunter. 61 N. Y. S. 73.

McLeod sues the maker upon a note which specified no time for payment.

Held, that a note is a negotiable instrument although no time is specified when it shall become due, in which event it is due on demand.

McAdam, J.

The note, omitting the date and signature, is in these words: "I promise to pay to the order of A. A. McLeod, \$2,000, at his office, N. Y. City." Such a note is, by law, payable on demand, and in this respect it cannot be varied by oral evidence. The omission of the words "for value received" does not impair the note, affect its legal import, or weaken the presumption that it was given for value. There being no substantial defense, judgment must be directed for the plaintiff.

2. Postdated Instrument.

Triphonoff v. Sweeney. 65 Ore. 299.

The Sweeney Construction Company on March 25, 1911, gave a check to Malcheff dated April 15, 1911, which Malcheff negotiated to the plaintiff before maturity. The Sweeney Company subsequently stopped payment on the check as it was given in payment of forged estimates of work done. The plaintiff sues as holder of the check.

Held, that a check is not invalid because postdated or antedated.

Bean, J.

Section 5845, L. O. L., purports that the instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. It is the position of counsel for defendants that this section renders an antedated or postdated instrument merely

legal, and does not make it negotiable. We fail to see any reason why it was necessary for this enactment in order that the issuance of such an instrument should not be in violation of any statute or law. The purpose of the negotiable instruments law is to direct the proper method of dealing with such an instrument. This section has a broader signification, and renders a postdated or antedated check full, complete and valid.

Independent of any statutory regulation, it makes no difference whether a check be postdated or antedated, it is still payable according to its express terms. The drawing of a postdated check is an everyday occurrence in the commercial world, and the uniform understanding of the parties is that, when a check is postdated, it is payable on the day it purports to be drawn, even though it be negotiated beforehand. A postdated check, or one which bears a date subsequent to that of its actual issue, is payable on or at any time after the day of its date, being in effect the same as if it had not been issued until that date. An antedated or postdated instrument may, of course, be negotiated after or before the date given, and anyone to whom such an instrument is given acquires title thereto as of the date of delivery. The contention of the defendants is that the instrument was not a check, for the reason that it was not payable on demand, and that the same was not negotiable. We incline to the belief that the instrument was a check, payable on demand on or after April 15, 1911. This conclusion is in harmony with cases wherein it is held that a postdated instrument of this nature is a check, and not a bill of exchange, which would authorize the holder to present the same for acceptance prior to the time when it would be payable.

3. Right of Holder to Insert Date.

Bank of Houston v. Day. 145 Mo. App. 410.

Keel & Hoover borrowed money from the plaintiff bank and gave a note which was delivered to the bank about December 1. This note was filled out in every respect except for the date, which was blank. The cashier of the bank afterwards inserted the date, December 30, an unauthorized completion which the defendant indorsers contend released them from liability.

Held, that the holder of a note has authority to fill in the true date if it is undated, but may not fill in any other date.

Nortoni, J.

A promissory note may be a valid instrument either under the law merchant or under the Negotiable Instrument Law even though it is undated. It is true there is an implied authority under the law merchant in the holder of a note signed in blank and delivered to another, for the purpose of negotiation, to fill in such blanks as are essential to make it a complete instrument for the purpose intended. It not being essential to the validity of a promissory note that it shall

express a date (that is, although a promissory note undated may nevertheless purport a valid obligation, the date of which may be inquired into and ascertained), we believe the implied authority touching the date may not be so broad and comprehensive as that pertaining to such blanks therein as are essential to rendering the instrument a complete obligation. Whatever authority there is in the law merchant for filling in the date of a note, we believe, rests more particularly upon the fact that it is essential to the free and uninterrupted negotiability of the instrument that it should be dated, and upon the presumption that all parties to a note intended for circulation obviously consented that a proper person to whom the same was entrusted for the purpose of raising money, might fill the same with the proper date.

Now, there is no doubt where a note is issued without a date and an improper date is inserted therein by the payee and the note is thereafter negotiated to an innocent party or bona fide holder without notice, that such bona fide holder may enforce the same notwithstanding the improper date. This follows for the reason that one who signs such an instrument furnishes the means of fraud and is estopped to deny his liability thereon.

Be this as it may, the date of a negotiable instrument is important in many respects. Although it may be valid and enforceable without an expressed date, it is nevertheless an inconvenient instrument in the commercial world if undated and likely to produce much confusion and evil results. It would indeed be difficult to ascertain and determine the rights of the parties to an undated instrument in circulation expressing an obligation payable four months or six months after the date thereof. If no date appears, how is the bona fide innocent holder without knowledge of the date of issue to determine when the obligation is due and notice of dishonor should be given? These considerations would obviously authorize the payee or other proper person to insert the proper date as between the immediate parties. However, many reasons suggest themselves why the payee ought not to be allowed, as between himself and the makers and indorsers, to insert an improper date, for by so doing, he might materially increase the obligation to be paid.

It became the duty of the cashier of the bank to insert the date August 30, 1905, as instructed by McCaskill, if his testimony is to be believed. On the contrary, if no instructions whatever were given, then it became the duty of the bank to insert the true date of issue identically as though it were an original payee. "Any holder has a right to insert the true date; and should he insert an improper date, the parties will still be bound to a bona fide holder for value and without notice of the impropriety."

Thus implying, of course, that the holder who has notice of the facts may not enforce a note when other than the true date has been inserted.

A party, having notice that other than the true date has been inserted, cannot recover on the note unless he acquired it from one who took it *bona fide* without notice.

After much careful reading and reflection on the subject, we believe, as a general rule, between the original parties to the instrument or subsequent holder with notice, the original payee or such subsequent holder with notice has implied authority by virtue of the blank contained in the note only to fill in the true date or such a date as was directed or contemplated by the parties.

4. Instruments Payable to Order or to Bearer.

Wettlaufer v. Baxter. 137 Ky. 362.

The Buffalo Carriage Top Company on July 3, 1905, executed to Baxter the following note: "January 15, 1906, after date we promise to pay to Newton J. Baxter two hundred and fifty dollars at 58 Carroll St., Buffalo, N. Y."

Baxter indorsed the note before maturity to Wettlaufer, who discounted it. When the note fell due, the Carriage Top Company refused payment. Wettlaufer sues Baxter, who denies liability on the ground that the note was not a negotiable instrument.

Held, that a non-negotiable instrument is not made negotiable by an indorsement in blank.

Carroll, J.

The contention is that the note was not a negotiable instrument, and that Baxter by signing his name on the back of the note became merely an assignor and not liable, unless suit was brought on it at the first term of the court against the maker, the Buffalo Carriage Top Company, and it prosecuted to insolvency. In other words, the effort is to apply to this case the rule of law that, before an assignee (as it is said Wettlaufer is) can recover of an assignor (as it is contended Baxter is), he must institute his action against the payer of the note at the first term of the court after the note falls due, obtain judgment, have execution issue, and a return of no property found, without unreasonable delay. If the law as declared in this line of cases applies to this note, it is manifest that the ruling of the lower court was correct, as there is no averment that the Buffalo Carriage Top Company was prosecuted to insolvency, or that any action was brought against it before proceeding against Baxter.

In considering the questions involved, we will for convenience refer to the negotiable instrument act adopted in this state. The sections of the act pertinent are:

"Sec. 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

- (1) A payee who is not maker, drawer, or drawee; or
- (2) the drawer or maker; or
- (3) the drawee; or

- (4) two or more payees jointly; or
- (5) one or some of several payees; or
- (6) the holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

"Sec. 9. The instrument is payable to bearer:

- (1) When it is expressed to be so payable; or
- (2) when it is payable to a person named thereon or bearer;
or
- (3) when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
- (4) when the name of the payee does not purport to be the name of any person; or
- (5) when the only or last indorsement is an indorsement in blank."

For the purpose then of ascertaining what bills and notes it was intended should be negotiable within the meaning of this act, we may with propriety inquire what words were generally considered necessary to make a note or bill negotiable before this act went into effect, with a view of noting what change if any was made in this particular. "The usual form of negotiable paper is a provision for payment to 'order' or 'bearer.' These or similar words are in general necessary to its negotiability, and are often required by statute, but a note which is non-negotiable for want of such words is still a valid note and may be declared on as such. Bills payable to bearer were formerly held to be non-negotiable, as being without words of transfer; but they are now recognized as negotiable and transferable by delivery. Making the instrument payable 'to the order of' a person named is the same as to such person 'or order'; and in like manner to a person named 'or bearer' is the same in effect as 'to bearer.' Without words of negotiability purchasers take the bill or note subject to all defenses which were available between the original parties; and if it was originally non-negotiable, as against the original parties, it will not be rendered negotiable by subsequent transfer in negotiable form."

It will thus be seen that it was uniformly held that, in order to make a note or a bill negotiable, the words "to order" or "to bearer," or equivalent words, must be used in the body of the note. It will be kept in mind, however, that the absence of these words [does] not affect the validity of a note or render it non-transferable or non-assignable. Their only effect is to make the instrument negotiable, and thereby cut off defenses that the maker, or either of the parties to the paper, might have and make against a holder in due course if the note was not negotiable. The negotiable instrument act does not apply to or affect the rights or liabilities of persons on paper that is not within its meaning negotiable. But, if a note is made payable to a specified person "or order," or to a specified person "or bearer," and such a paper comes into the hands of a holder in due

course—that is, a holder who has taken the instrument under the following conditions mentioned in section 52, “(1) that the instrument is complete and regular upon its face, (2) that he became the holder of it before it was overdue and without notice that it had been previously dishonored if such was the fact, (3) that he took it in good faith and for value, (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it”—then neither the maker of the note nor any other person on it can make as against him defenses such as fraud, or want of consideration, or the like, that they or either of them might have made if the note was not a negotiable instrument. In short, if a note is not a negotiable instrument within the meaning of this act, then the rights and liabilities of the parties on it are to be determined by the law as administered with reference to non-negotiable instruments. If it is a negotiable instrument in the meaning of the act, then the rights and liabilities of the parties to it are fixed and determined by the provisions of the act alone. This note in our opinion, which was payable to Baxter alone, and did not contain the words “to order” or “bearer,” was not a negotiable instrument. These words by sections 1 and 184 are indispensable to make the paper a negotiable instrument within the meaning of the act.

But the argument is further made that as Baxter indorsed the note in blank—that is, signed his name on the back of it without any other words—he thereby converted the note into a negotiable instrument. It is true that section 9 of the act provides that “the instrument is payable to bearer . . . when the only or last indorsement is an indorsement in blank,” but this does not mean that an indorsement in blank converts a note non-negotiable on its face and by its terms into a negotiable note. The construction would enable the person who last signed his name on the back of the note to change entirely the contract as entered into between the parties, and have the effect of making the maker, payee, and all prior indorsers liable upon a negotiable instrument when they intended to and only became liable upon a note that was not negotiable, and this, as can readily be seen, would be a most important and material change in the obligation assumed by them when they signed the paper. To give the act this construction would place it in the power of any indorser who chose to sign his name in blank to change by this act the entire character of the paper as well as the rights and liabilities of the parties to it. It would make the character of the paper depend upon the manner of the indorsement and not upon the terms expressed in the paper. Thus if A. indorsed it in blank to B., it would be negotiable; but, if B. indorsed it specially to C., it would be non-negotiable. Manifestly it was not intended that the mere indorsement of the note by a remote or other indorser should have this effect. When a paper is started on its journey into the commercial world, it should retain to the end the character given to it in the beginning and written into its face. If it was intended to be a negotiable instrument, and was so written, it should continue to be one. If it was intended to be a non-negotiable instrument and was so written, it should so

remain. Then everyone who puts his name on it, as well as everyone who discounts or purchases it, will need only to read it to know what it is and what his rights and liabilities are.

In our opinion, section 9 was merely intended to describe or designate the conditions under which a note negotiable on its face might become payable to bearer, and was not intended to apply to a note not on its face or by its terms negotiable.

5. Payee Named in Alternative.

Voris v. Schoonover. 91 Kas. 530.

Schoonover made a note payable to the order of Cochran or Dygert. Cochran, for value, indorsed the note to the plaintiff, who sues upon it. The defense is to the effect that it should have been indorsed by both payees.

Held, that a note may be payable to persons in the alternative, in which event the indorsement of either is sufficient.

Benson, J.

Section 15 of the negotiable instruments law provides: "The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

- (1) A payee who is not maker, drawer, or drawee; or
- (2) the drawer or maker; or
- (3) the drawee; or
- (4) two or more payees jointly; or
- (5) one or some of several payees; or
- (6) the holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty."

It will be observed that subdivision 4 refers to joint payees, while subdivision 5 refers to one or some of several payees. This instrument falls under this last subdivision. Section 48 of the same law declares that:

"Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others."

Construing this section with subdivision 4 of section 15, a note payable "to A and B" must, if the payees are not partners, be indorsed by both, but if payable "to A or B," the order to pay is complete on the indorsement of either.

A statute of Iowa is identical with section 48 of our law. In an action in that state upon a promissory note, made payable "to the Royal Mutual Life Insurance Company, or Hugh Blackman," the court said:

"It is manifest that the note before us does not fall within the

terms of the statute, for the reason that it was not made payable to two or more payees or to their order. It was made payable to either one of two payees, and its indorsement by either one of the payees named therein would pass title. Under the last-named provision of the statute, a note made payable to one or some of several payees is payable to the order of any of the payees named, and is negotiable."

While the provision of the Iowa code last referred to in the opinion differs in phraseology from section 15 of our negotiable instruments law, we believe the legal effect is the same. Without regard to that decision, however, it seems clear that where a note is made payable "to A or B," the indorsement of either constitutes the order and is sufficient. The district court so held, and the judgment is affirmed.

6. Instrument Payable to Payee or Bearer.

Bullard v. Bell. 1 Mason (C. C. U. S.) 243.

Bullard sues on a bank note made payable to W. Pitt or bearer. The president of the bank issuing the note, who was personally liable by statute, defends in part on the ground that the bank note should have been indorsed or assigned by Pitt.

Held, that a note payable in the alternative to bearer is a note payable to bearer.

Story, J.

A note payable to bearer is often said to be assignable by delivery; but in correct language there is no assignment in the case. It passes by mere delivery; and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker, to pay any person who shall become the bearer; it is therefore payable to any and every person who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer. The case is still stronger in relation to bank notes; for in the common transactions of life they pass by delivery as cash. When made payable, as in the present case, to "W. Pitt or bearer," nobody supposes that they are payable to a real person, who thereby acquires an interest in them. It is notorious that such names are fictitious; and the whole objects of the bank would be defeated, if the holder could not entitle himself to recover upon them, without showing an assignment, or delivery, from the fictitious person. They pass out of, and into, the bank a thousand times, and are always understood to be payable to the bearer, whoever for the time being he may be, and to no one else. And even if "W. Pitt" were a real person in this case, it would not change the nature of the suit; for the note would still be payable to the bearer, although he never claimed by

or through "W. Pitt," since it is payable in the alternative, and not to "W. Pitt" absolutely. Even a payment to "W. Pitt" would be no discharge of it as against a subsequent bearer, *bona fide*, for a valuable consideration; for bank notes payable to bearer are always deemed good while they remain in circulation, notwithstanding they have been presented to the bank and paid by the bank.

7. Instrument Made to Fictitious Person.

Snyder v. Corn Exchange National Bank. 221 Pa. 599.

Snyder, a broker, gave power of attorney to his clerk, Greenfield, to draw checks in Snyder's name on the defendant bank. Greenfield drew checks payable to the order of Niemann, a fictitious person, forged Niemann's indorsement, and collected the proceeds. The plaintiff insists that the bank should not have paid these checks, basing his claim in part upon the idea that they were not negotiable instruments because drawn payable to a fictitious person.

Held, that a negotiable instrument may be drawn to a fictitious or non-existing person.

Brown, J.

Greenfield was responsible to his employer for the abuse of the power conferred upon him, and the employer's concern was that it should not be abused; but it was never any concern of the bank why, or for what purpose, any check had been drawn by the clerk under the broad power given him by the employer. Its sole duty was to pay without question whenever a check so drawn was presented by the party to whom Greenfield intended it to be paid, and his intention every time he drew a check became, as to the bank upon which it was drawn, the intention of the man who had empowered him to draw it.

By our negotiable instruments act a check is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." The averment in the affidavit of defense is that Niemann was not a real, *bona fide* payee, but was in legal contemplation a fictitious person, such fact having been well known to Greenfield at the time he drew the checks; that Niemann had no right to them, or any of them, and it never was intended by Greenfield that he should receive them or their proceeds. Niemann may have been an existing person, but he could have been, and was, a fictitious one within the meaning of the act of assembly if Greenfield intended to use his name, and did use it, as that of a person who should never receive the checks nor have any right to them. The intent of the drawer of the check, in inserting the name of a payee, is the sole test of whether the payee is a

fictitious person, and the intent of the drawer of these checks as attorney for the appellant must, as just stated, be regarded as against the bank upon which they were drawn as the intent of the appellant himself. A fictitious person within the contemplation of the act of 1901 is not merely a nonexistent one, for, if so, the word "non-existing" would have been sufficient without more. It is clear, then, that when the legislature declared that a check payable to a "fictitious or nonexistent person" is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it, therefore, matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed.

8. Instrument Payable to Impersonal Payee.

The Mechanics' Bank of the City of New York v. Straiton.
3 Keyes (N. Y.) 365.

The bank sues the defendant as drawer of a check made payable "to bills payable or order." The defense is that this was not a negotiable instrument.

Held, that the name of the payee of a negotiable instrument need not necessarily be that of a person.

Scrugham, J.

The rules which establish the negotiability of commercial paper apply to bank checks as to other bills of exchange, and the doctrine that when such instruments are made payable to the order of a fictitious payee, they are to be construed and treated as payable to bearer, is too well settled to admit of serious question.

The words "or order," "or bearer," and "bearer," in notes or bills, are words of negotiability, without which, or other equivalent words, the instrument will not possess that quality, and therefore the use of either of these expressions by the drawer of a bill or maker of a note must be regarded as indicating his intention that the paper shall be negotiable.

By naming the person to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and the words of negotiability, when used in connection with such designation, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without indorsement; i. e., in the same manner as if it had been made payable to bearer.

C. *Contractual Incidents of Negotiable Instruments.*

1. *Necessity of Delivery.*

Angus v. Downs. 85 Wash. 75.

The plaintiff sues as holder in due course upon a note made by the defendant, Downs, who defends on the ground that it was stolen from him after it was made, but before it was delivered.

Held, that under the Negotiable Instruments Act, a valid delivery is conclusively presumed in favor of a holder in due course.

Fullerton, J.

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

This section [of the negotiable instruments law], it will be observed, provides in terms that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. Language could hardly be made plainer, and is as applicable to a holder in due course of commercial paper stolen before delivery as it is to commercial paper stolen subsequent to delivery, or commercial paper the title to which is defective for any other reason.

"As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. There accordingly is no doubt that delivery of a negotiable instrument is necessary to create any liability as between the immediate parties. But the authorities have long been in violent conflict as to whether a bona fide holder can recover on an instrument which has never been delivered by the maker or drawer to any one for any purpose. Some courts have held that delivery is not essential to the validity of an instrument in the hands of a due course holder. And this rule has been declared to be applicable in case the instrument has been taken from the maker's possession by theft. On the other hand, many courts have taken the view that an innocent holder for

value of paper commercial and negotiable in form, but which has never been completed by delivery, cannot acquire rights thereto against the alleged maker. And it has been held that a negotiable security, stolen from the maker before it has become effective as an obligation by actual or constructive delivery, may not be enforced by any subsequent innocent holder. These courts have reasoned that the wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value, but that a note in the hands of the maker before delivery is not property nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Sound reason would seem to require the question to be resolved with a view to the facts of the particular case and the principles of negligence. No doubt, where the maker of a negotiable instrument negligently allows the same to get into circulation, he should be held liable to a bona fide holder upon the ground that he is estopped by his own negligence to deny a valid delivery. The maxim declaring that where one of two innocent persons must suffer by reason of the wrong of a third party, he whose act made the wrong possible should bear the loss, should apply with full force. But it is somewhat shocking to suppose that the maker having exercised due care may be deprived of his property without his consent. Nevertheless this is clearly the intention of the negotiable instruments law, which declares that 'where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.' This principle applies only to complete instruments, however, for it is declared, also, by the act, that 'where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.'

2. Instrument Both Incomplete and Undelivered.

Linick v. Nutting & Co. 140 App. Div. (N. Y.) 265.

Linick signed his name to a blank check which was stolen from him, filled up, and, after certification, indorsed to the defendant for value. The defendant collected the amount from the bank. Linick, who took up the check from the bank, sues the defendant for money had and received to his use.

Held, that an incomplete and undelivered instrument confers no rights on the holder.

Burr, J.

As a general rule, one can only part with title to personal property by his voluntary act, or by conduct sufficient to create an estoppel.

In the case of commercial paper it was long ago held that when by voluntary act a party entrusts another with such paper with a blank thereon designed to be filled up with a stipulated amount, such party is liable to a bona fide holder of the instrument, although the amount inserted was larger than that agreed upon. So, if the place of payment is left blank when the maker delivers it, the insertion of a different place of payment than that agreed upon will not avoid such paper in the hands of an innocent holder for value. The authorities are not harmonious as to the basis of this liability. Some deem that it rests upon an implied authority conferred by the maker upon the person to whom it was delivered to fill in the blanks, and others upon estoppel by reason of negligence. Upon neither of these grounds can the plaintiff be charged in this case. Certainly not upon the ground of implied authority, for that doctrine grows out of the relation of principal and agent, and there is no such relation between a thief and his victim. There is a vast difference in the rule of liability upon negotiable instruments between a case where the possession has been parted with by the affirmative act of the maker in an incomplete state, and one where his parting with such possession is the result of a crime. The rule that the bona fide holder of an incomplete instrument, negotiable but for some lack capable of being supplied, has an implied authority to supply the omission, and to hold the maker thereon, only applies where the latter has by his own act, or the act of another, authorized, confided in or invested with apparent authority by him, put the instrument in circulation as negotiable paper.

Plaintiff cannot be charged with negligence giving rise to an estoppel, unless a man is guilty of negligence in writing his name upon a piece of paper which by some possibility may afterwards be stolen from him, which paper afterwards comes into the hands of a third person who is an entire stranger to the transaction, with words written over the signature which are sufficient in form to make it a check or note. Actionable negligence involves, *first*, the existence of a duty; *second*, the omission to exercise ordinary and reasonable care in connection therewith; and *third*, injury resulting in consequence thereof. It has been held that where the maker of a completed negotiable instrument has parted with its possession, but [it] is in such form that it is possible to make alterations in it, he is not guilty of negligence in thus delivering it, for the reason that he is not bound to assume that the person to whom he delivers it will be likely to commit a crime because it is apparently easy to do so. The drawer of a check is not bound so to prepare it that nobody else can successfully tamper with it. Much less can a party be held liable for negligence because it is possible that he may be deprived of the possession of an incomplete negotiable instrument by a crime. He is not bound to anticipate nor guard against such an act. No case has been cited holding a maker liable under such circumstances.

This rule of law has now passed into the statute in these words:

"Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." The provision of the subsequent section of the same act, to the effect that "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed," must be read in connection with said section 34, and this provision does not apply in the case of an incomplete instrument, completed and negotiated without authority.

3. Estoppel to Deny Delivery.

Allen Grocery Co. v. Bank of Buchanan County. 192 Mo. App. 476.

Allen, the president of the plaintiff company, on going away for his vacation, left checks signed in blank by himself in the custody of Morrow, the manager, who kept the check book on the top of his desk. While Morrow was at lunch, Rose came in and stole three checks, which he made payable to himself, and which the bank cashed for him. The Grocery Company claims that the checks were invalid because not delivered, and that the bank should not have cashed them.

Held, that a maker of a negotiable instrument may be estopped by his negligence to set up want of delivery as a defense.

Johnson, J.

Counsel insist that their position has the support of the weight of authority as it stood at the time of the passage of the Negotiable Instruments Act, and is completely and irrefutably sustained by that act, which provides: "Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." Especially is this argument urged against the validity of the checks of \$2700.95 and \$195.15, the payment of which, not being made out of funds of plaintiff on deposit, was voluntary on the part of defendant and should be regarded as the act of a purchaser rather than that of a debtor bound by law to honor the demand of his creditor.

In the present case, though Morrow, the manager, was invested with special authority to fill out and deliver the signed blanks, they remained in the possession of plaintiff, the drawer, and had not been delivered to any person at the time of the theft. The custody of the manager, who was the ranking executive officer of the corporation in the absence of the president, was the custody of the corporation, and when the blanks were stolen they were in the condition of being signed but still in the possession of the corporation which

signed them. As a general rule the delivery of an incomplete negotiable instrument by the maker who signs it is indispensable to the creation of a contractual obligation on the part of such maker. Until delivery, the instrument is but so much waste paper. The provisions of Section 9986 are merely a legislative enactment of this rule, which had the support of the great weight of authority when the Negotiable Instruments Act was adopted in this state. We think this section was not intended to abrogate or impair other well-recognized rules by which in certain instances delivery by the maker would be implied, either from authority actually conferred by him upon an agent, or from conduct which should estop him from claiming that he had not delivered or authorized the delivery of the signed instrument. If Morrow, who had authority to fill out blank checks and deliver them for the uses of plaintiff's business, had, in excess of that authority, converted funds of plaintiff to his own use through the pretended exercise of such authority, plaintiff could not have escaped liability to an innocent holder of such paper, since authority to do the excessive act would be implied from the authority actually given.

The conduct of the maker or acceptor of a negotiable instrument signed in blank may be sufficient to create an estoppel, though the mere signing and withholding from delivery of such paper is not enough to constitute negligence and liability as upon paper delivered. [Delivery] by the maker or acceptor will not be imputed from a mere lack of ordinary care in the custody of the paper after it is signed.

Was plaintiff, in the instant case, guilty of conduct sufficient to raise an estoppel against the claim that it did not deliver the checks nor voluntarily put them into circulation? Allen, the president and principal stockholder of the plaintiff corporation, controlled its policies and business affairs. He was an able, experienced and careful merchant who had succeeded in building up a large and successful business, and it is with much reluctance that we give expression to the conviction that in adopting and pursuing the course of business under consideration, he and the manager who acted under his orders were grossly negligent in keeping the book of signed blank checks in such an exposed place without taking any precautions to guard against its spoliation. In the manager's use of the book, knowledge was imparted not only to the employees but to others who visited the office on business, that it contained signed blank checks. That fact may be said to have been publicly proclaimed, and by offering such easy opportunities for the commission of a crime, plaintiff was as much a tempter of the criminally minded and morally weak to whom such opportunity might come as it would have been had it left money lying unwatched and exposed in the office, or, as in one of the English cases, had signed a blank check and tossed it into the street.

Regarding defendant merely in the light of an innocent holder for value, we think the facts of the case upon the plainest principles of fairness and justice estop plaintiff from taking the position that,

as to such holder, it did not voluntarily part with the possession of the checks and, therefore, in law, deliver them.

4. Delivery in Escrow.

Deardorff v. Foresman. 24 Ind. 481.

Foresman, the plaintiff, was the payee of a note made to him by Deeds. Deeds procured the signatures of the defendants upon the note as sureties for his accommodation, upon representing to them that he would not deliver the note to the plaintiff until he obtained the signatures of eleven other responsible parties. He, however, delivered the note immediately, and the plaintiff sues upon it. The defense is based upon the fact that the indorsements were conditional.

Held, that sureties may not deliver a note to the principal debtor in escrow.

Ray, J.

The delivery of a deed may be either absolute, that is, to the grantee himself, or to some person for him, or else conditional, that is, to a third person, to keep it till something is done by the grantee; in which last case it is not delivered as a deed, but as an escrow. The instrument is as perfect and complete in form when delivered as an escrow, as though it were to be delivered absolutely. An instrument delivered as an escrow cannot be withdrawn, but remains in the hands of the holder to be delivered over to the party for whose benefit it was executed, whenever he performs the conditions upon which the original delivery was made. But so long as the instrument remains in the hands of one of the parties, it has no force whatever.

It seems clear, on principle, that a surety cannot make a delivery of a bond to his principal as an escrow, upon condition that other names shall be procured before its delivery to the obligee. The very definition of an escrow involves the holding of the instrument, complete in form, signed and sealed, prepared for delivery to the obligee, by a third person, who acts as the agent of the obligors and obligee, and who is to make the delivery, not upon some act done by the obligors, but upon the performance of some condition by the obligee. There are but two parties to the instrument, and so long as it is held by the principal, it cannot be said to be delivered for any purpose, for it remains still in the hands of the one party, who is only to be bound in any manner upon its delivery to the other. And where there is no delivery of the instrument by the one party executing it, it cannot be said to be held as an escrow.

Can a delivery then be made to the principal, as the agent of his sureties, for any other purpose than an unconditional delivery to the obligee?

The interest of the principal is clearly to procure the acceptance

of his bond by the obligee, at the earliest moment, and with the least number of sureties. Experience proves, and the law so regards it, that it is a hardship to procure bail, and the interest of the principal is to avoid this hardship. On the other hand, the interest of the sureties is as clear to avoid a delivery until their pro rata liability has been reduced by the execution of the bond by other co-sureties.

It is a well-established principle of law, that he who has an interest in the doing of a particular act cannot accept an agency in the same matter for others whose interests are adverse to his own. A person will not be permitted to assume an agency for others where the interests of his principal would be in direct conflict with his personal interests.

The law, indeed, makes the principal, for a special purpose, i. e., the delivery of the instrument, the agent of his sureties. Their delivery of the instrument to the principal, after placing their names upon it, authorizes the principal to make the delivery to the obligee, for such is the channel through which the paper would properly pass in reaching the obligee. And the delivery of the instrument to be by him at once transferred to the obligee, is a delivery entirely consistent with the interests and inclination of the principal, and for such a purpose the delivery is proper.

Now is it not clear, that as the general purpose of the delivery by the sureties to the principal is that he may make a delivery to the obligee, no conditions imposed upon such delivery will bind the obligee unless they are known to him?

Thus, in our opinion, should the rule be established upon principle; and we are inclined to regard the real weight of well considered decisions as sustaining the rule which to us seems to rest also upon a correct principle.

5. Presumption of Consideration.

McCormack v. Williams. 88 N. J. L. 170.

McCormack sues as holder of promissory notes made by Williams to Keeler. The defendant insists that there was no consideration for the making of the notes and that the plaintiff had knowledge of that fact. The question arises whether the plaintiff is entitled to have the case submitted to the jury without introducing evidence that there was consideration.

Held, that lack of consideration is an affirmative defense to the negotiability of an instrument and must be proved by the defendant.

Walker, C.

Our Negotiable Instrument Act provides in section 24 that every negotiable instrument shall be deemed *prima facie* to have been issued for a valuable consideration, and that every person whose signature

appears thereon is deemed to have become a party thereto for value. Therefore, when the plaintiff proved the notes in suit, offered them and rested, he established a *prima facie* case. And that entitled him to go to the jury. The notes spoke for themselves. They gave inherent evidence of validity. Because all the individual witnesses who testified gave evidence tending to show their invalidity, no matter how strong that evidence, it raised, in effect, a conflict of testimony; and conflicting testimony is always for the jury. A trial judge is only justified in granting a nonsuit or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case.

Nor is the situation any different because it was contended that the plaintiff procured the notes after maturity. At maturity promissory notes become subject to certain defenses which previously did not exist, and in section 28 of our Negotiable Instrument Act it is expressly provided that the absence or failure of consideration shall be matter of defense as against any person not a holder in due course, that is, not a holder before maturity without notice of any invalidity in the instruments. This defense does not speak for itself; it has to be interposed and proved.

In our opinion, the trial judge should have submitted the issue in this case to the jury for their determination, and, because he directed a verdict for the defendant, he erred.

6. Effect of Want of Consideration to Accommodation Party.

Wilbourn v. Hawkins. 38 R. I. 116.

In a suit by Wilbourn to enforce payment of a note given for groceries by Hawkins and Mrs. Hawkins, the latter contends that as she was not liable for the goods, the note is without consideration as against her.

Held, that if there is consideration for a note, the fact that a person is an accommodation indorser or maker will not relieve him from liability.

Vincent, J.

The defendants now claim that Isabelle P. Hawkins was an accommodation maker, so far as the plaintiff was concerned, and that inasmuch as the note was never negotiated or passed to a third party for value, her relation to the plaintiff continued to be that of an accommodation maker, and that she had the right to have the question submitted to a jury as to whether or not there was any consideration for the note so far as she was concerned.

With this contention of the defendants we cannot agree. The defendants are jointly and severally liable upon the note under the provisions of the Negotiable Instruments Act. The plaintiff is the payee of the note and the note is in his possession. He is therefore the holder of the note under Section 1 of the act referred to, which

says that "'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof."

We think also that the plaintiff is a holder for value. Value, according to the statute, "is any consideration sufficient to support a simple contract. An antecedent or preëxisting debt constitutes value, and is deemed such, whether the instrument is payable on demand or at a future time." The note was given for a debt due to the plaintiff and in consideration thereof he receipted the grocery bill, which amounted to the cancellation of an antecedent or preëxisting debt. The plaintiff being a holder for value, it is immaterial whether the defendant, Isabelle P. Hawkins, be considered as an accommodation party or otherwise, for the statute says that "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

7. Construction: Words and Figures.

The People v. Lewinger. 252 Ill. 332.

A check was made to Lewinger reading by mistake "twenty-five hundred dollars," instead of "twenty-five dollars." The figures, however, read "\$25.00." Lewinger raised the figures to "\$2500.00" and was indicted for forgery. He was not guilty.

Held, that when there is a conflict between the written portion of a negotiable instrument and the figures, the former prevails.

Cartwright, J.

The question in the case is whether such a change is a material alteration of a check so as to change its character and legal effect and make it a check for a different amount than the sum payable as originally drawn. The first paragraph of section 17 of the Negotiable Instrument Act fixes the law of this state on that subject, and is as follows: "Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount." In this check the sum payable was expressed in words and was "twenty-five hundred dollars," and the words were neither ambiguous nor uncertain, so that the sum payable was \$2500. The alteration of the figures, therefore, did not change the legal effect of the instrument. That was the law established before the passage of the Negotiable Instrument Act. The question whether the figures in a school order for the payment of money were a material part of the order arose in [a] case [where] the order was for \$36, and it also bore upon its face the dollar mark and figures representing that

amount. It was held that the figures were no part of the order, and the court said: "Where the words used in the body of a note or order for the payment of money are ambiguous, so that there is uncertainty in regard to the true amount that was intended, resort may be had to the figures in the margin of the instrument for the purpose of determining the true amount agreed to be paid. But the figures in the margin of an instrument are not strictly a part of the contract. They cannot be reverted to to impeach the amount named in the body of the paper, and are never resorted to for any purpose unless there is uncertainty in regard to the amount written in the body of the instrument." The substance of that decision is now embodied in the Negotiable Instrument Act, and as there was no uncertainty in the amount written in the body of this check, the figures as originally written could not be resorted to to change its effect or meaning. Other courts have held that an alteration of marginal figures on a check in which the amount payable is plainly expressed in words is not forgery.

The most that can be said is, that if there had been no change in the figures, the party who took the check might have noticed the discrepancy and been led to make inquiry what the intention of the maker was, but the fact is that the maker of the check merely made a genuine check for a larger sum than was intended.

8. Construction: Printed and Written Provisions.

Acme Coal Company v. Northrup National Bank. 23 Wyo. 66.

The Acme Coal Company gave a note to the United States Iron Works Company for the purchase price of pit cars which proved defective. The note was drawn on a blank form, and the interest rate of 7 per cent. had been inserted with a typewriter. A circle had been drawn around the figure "7" with pen and ink, and above it was inserted the figure "8" with pen and ink. The plaintiff bank, to which the note was negotiated, sues on the note. The defense is that the interest rate was uncertain, and the note therefore not negotiable.

Held, that when there is a conflict between printed and written provisions in an instrument, the written portion prevails.

Beard, J.

The defendants contend that the note is not a negotiable instrument by reason of an uncertainty in the rate of interest it bears appearing on its face, there being a conflict between the rate as inserted in the printed blank by the typewriter and that with pen and ink. The rule of construction provided by our statute (it being what is known as the Uniform Negotiable Instrument Act) is, where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail. Had the figure "7" been printed

in the blank as it was printed on a printing press, and the figure "8" written with pen and ink, the rule of the statute would unquestionably apply. The question here is, is that portion of this note which is typewritten to be considered as printed, or as written? When we consider what we conceive to be the reason for the rule, as laid down in the statute, and the connection in which the words "written" and "printed" are there used, we think the question is not difficult of solution. The printed form or blank is used for convenience and is prepared in advance of the final agreement between the parties; and when a conflicting provision is afterward inserted therein in writing, the natural and reasonable presumption is that the later and written provision expresses the true intent of the parties. The word "writing" is defined in the Century Dictionary, "Specifically, as distinguished from printing, stamping, incision, etc., the act or art of tracing graphic signs by hand on paper, parchment, or any other material, with a pen and ink, style, pencil, or other instrument." And the word "print" is defined by the same authority, "Specifically, to stamp by direct pressure, as from the face of types, plates, or blocks covered with ink or pigments; impress with transferred characters or delineations by the exercise of force, as with a press or some other mechanical agency." And "typewriting" is defined, "The process of printing, letter by letter, by the use of a typewriter." When, as in this case, it clearly appears from an inspection of the instrument that the blank form used was "printed," using that term in its common and ordinary sense, and the blanks therein are filled in on a typewriter, and then it further appears that there is a conflict between a typewritten provision and one afterward made with pen and ink, we think the typewritten portion of the instrument must be considered as "printed" within the meaning of the statute. We do not wish, however, to be understood as holding that in all cases and under all circumstances typewriting is to be construed as printing; but that in the circumstances here presented it is to be so construed, and that the rule adopted by the statute applies, and that the rate of interest in the note is not uncertain, and that it is a negotiable instrument.

9. Construction: Joint and Several Instruments.

Lewenstein v. Forman. 223 Mass. 325.

Lewenstein, the payee of the note in suit described in the opinion, sues the defendants severally. They contend that the instrument was a joint obligation.

Held, that when the word "I" is used in a note signed by several parties, the obligation is joint and several.

Carroll, J.

Over an "I" in the note of the defendants to the plaintiff is the word "We," so that the note reads: "On demand after date ^{We}I

promise to pay." The defendant argues the note was a joint, and not a joint and several note, and the defendants must be joined. In a promissory note containing the words "I promise to pay," signed by two or more persons, they are deemed to be jointly and severally liable therefor. The instrument is not only a promise jointly; it is the promise of each severally. It contains not only the words "I promise," but the words "We promise" as well. Where the agreement was, "we, or either of us, promise," it was held to be a joint and several obligation. The words "we, or either of us, promise," in a promissory note, were held to create a joint and several promise. Separate proceedings, therefore, could be brought against each of the makers, and there was no error in the rulings of the court.

10. Construction: Instrument Made With Interest.

Franklin National Bank v. Roberts Brothers Company. 168 N. C. 473.

Roberts Brothers Company made two notes in the following form:

"\$2,500.

Wendell, N. C., Aug. 15, 1912.

November 16, 1912, after date we promise to pay to the order of Harding-Finley Lumber Company, twenty five hundred dollars at the Bank of Wendell, N. C. Value received, with interest at . . . per cent. per annum.

(Signed) Roberts Bros., Inc.,
J. L. Roberts, Prest."

These notes were given in exchange for notes of the Lumber Company to Roberts Brothers Company, which they discounted and paid at maturity, as the Lumber Company did not take them up. Roberts Brothers Company refuse to pay their own notes to the plaintiff bank to which they had been indorsed, and insist that they were not negotiable as no amount of interest was specified.

Held, that when a note is made "with interest," interest runs at the legal rate from the date.

Brown, J.

It is contended that the notes sued on are non-negotiable because there is a blank space for the rate of interest, which is not filled in. It seems to have been decided in a great many cases that stipulating for interest without the rate, i. e., leaving blank the rate of interest, does not affect the negotiability of a promissory note by rendering uncertain the amount, because a blank for interest cannot be filled

above the legal rate, and in the absence of a stipulated rate, the legal rate applies.

The legal effect of not filling in the blank is the same as if there had been nothing written or printed after the word "interest," and the reading of the note would be to pay "interest until paid." This causes the debt to draw the rate of interest fixed by law where no rate is expressed.

11. Construction: Signature by Agent.

Phelps v. Weber. 84 N. J. L. 630.

Phelps, a holder in due course, sues Weber individually upon a series of notes in the following form:

"25.00

February 25, 1909.

Twenty-two mos. after date we promise to pay to the order of J. F. Frech, Jr., twenty five dollars at 6 per cent. Value received.
United Ptg. & Paper Co., Inc."

(Indorsed)—"Peter Weber, President; C. P. Amalfitano, Sec. & Treas.; James G. Martin, Jr., V. P.; J. Fred Frech, Jr."

Weber intended to sign in a merely representative capacity.

Held, that the intent of a party to an instrument to sign in a representative capacity may be shown, and is material if the form of the instrument is consistent therewith.

Gummere, C. J.

What, then, is the measure of the liability, under the law of this state, of a person who indorses the promissory note of a company, and affixes the word "President" to his signature? The twentieth section of our Negotiable Instruments Act provides that "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." There is nothing either in the contract under construction, or by way of addition to the defendant's signature, which discloses the fact that the indorser signed on behalf of a disclosed principal, or that he signed in a representative capacity, and he can, therefore, take no benefit from the statutory provision. Does the latter part of this provision change the rule of law which prevailed in this state before the enactment of the statute, with relation to the liability of a person who signs an obligation of this kind and attaches an official designation to his signature? The rule is that where nothing appears in the body of the contract to indicate the maker, and it is subscribed by

a person who adds words to his signature indicating that he signs it in a representative capacity, the obligation is, *prima facie*, that of the individual; but this presumption is disputable, and parol evidence is admissible to show the intention of the parties and the right of the signer to bind the person whom he claims to have represented. And this rule prevails not only between the original parties to the contract, but also between the maker and a bona fide holder for value. The words of the statute are that "the mere addition of words describing him as filling a representative character, without disclosing his principal, shall not exempt him from personal liability." This is a mere legislative reiteration of the common law rule which was established and which prevailed in this state before the enactment of the statute, viz., that a person who signed such an obligation could not relieve himself from individual liability by the mere addition to his signature of words describing himself as filling a representative capacity, and the language used by the legislature does not seem to us even to suggest an intention on the part of that body to abrogate the rule of evidence which permitted the maker to show by parol testimony that it was not the purpose of the parties that he should be personally bound, but that the object sought to be accomplished—and understood between them—was the binding of a principal whom he was authorized to represent. We, therefore, are of opinion that the excluded offer, if it had been substantiated by proof, would have constituted a complete defense to the plaintiff's action, when coupled with proof that the defendant had authority to bind the company of which he was president by executing for it the contracts of indorsement upon which his liability was predicated. He attempted to show such authority by proof that the notes in suit were given in part payment of the purchase price of a printing plant sold to the United Printing and Paper Company by Frech. This proof was excluded by the trial court against his protest, and error is also assigned upon this ruling. If it had been admitted it would have supported the presumption that the defendant, by virtue of his office of president, had authority to bind the United Printing and Paper Company by the contract of indorsement.

12. Right of Minor to Disaffirm.

Murray v. Thompson. 136 Tenn. 118.

Murray, a minor, while in the employ of a brick company, sustained personal injuries. The company executed to him a note in satisfaction of his claim for damages. This note was sold by Murray's father, a transaction subsequently ratified by young Murray, to Thompson, and invested in a business which failed. Murray now seeks to disaffirm.

Held, that a minor may disaffirm a note or indorsement made by him.

Williams, J.

One of the questions on which judicial decisions were in conflict was, whether an infant's indorsement of a negotiable instrument was void or only voidable.

It was to make certain and uniform the law on this point that section 22 was embodied in the Negotiable Instruments Act. In stipulating that the indorsement of the instrument by an infant "passes property therein," it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be availed of by prior parties.

It was not intended to provide that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one.

The act does not concern the right of such an indorser to disaffirm under the rules of the law of infancy. The words "passes the property therein," if given a meaning that would deny that right in respect of a contract of indorsement, would deprive the infant of the right to reinvest in himself the title to the instrument against a holder who had knowledge of the indorser's infancy. The quoted words are not qualified so as to save his rights in such assumed case. It must be admitted that the legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law.

The act having no effect on the right of an infant to disaffirm, the precedents in relation to that right govern.

The common law rule is that the purchaser and indorsee of such a note is not a bona fide holder as against an infant indorser, and that the latter may disaffirm and recover the note from the possession of the former, who takes with constructive notice of the incapacity.

13. Effect of Non-Negotiability.

Wheatley v. Strobe and Wilcoxson. 12 Cal. 92.

Strobe was indebted to Wheatley, Wheatley to Howel, and Howel to Wilcoxson & Company. To pay his debt to him, Wheatley gave Howel an order on Strobe for \$236 payable to bearer, which Strobe orally accepted upon presentment by Howel. Before payment by Strobe, Wilcoxson & Company attached the money in Strobe's hands as that of Howel. Wheatley now sues to recover the original debt in order to determine the rights of Wilcoxson & Company.

Held, that an instrument, which through a defect in form is not a good negotiable instrument, may operate as an assignment.

Field, J.

Upon the facts in this case, the appellants make two points: First. That the verbal acceptance of Strobe was sufficient to render him liable to Howel upon the order of Wheatley; and, Second. If this be untenable, that the order operated as an equitable assignment of the demand against Strobe, which thus became subject to attachment as the property of Howel.

The first of these points cannot be sustained. The order possesses all the requisites of an inland bill of exchange. It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified, it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "please" does not alter the character of the instrument. This is the usual term of civility, and does not necessarily imply that a favor is asked.

The order being a bill of exchange, the written acceptance of Strobe was necessary to charge him as acceptor under the statute. His verbal acceptance was insufficient. Upon the order, therefore, he is not liable.

But the second point is well taken. The order, though not available as a bill of exchange against Strobe for want of acceptance, operated as an equitable assignment of the demand of Wheatley to Howel. It was given for an antecedent debt, and for the full amount of the demand against Strobe; the consideration was valuable, and there was no splitting of the amount due into distinct and different causes of action; and in such cases it is well settled that an order, whether accepted or not, operates as an assignment of the debt, or fund against which it is drawn.

The want of a written acceptance does not affect the right of Howel to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he must recover upon the original demand by force of the assignment. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the party beneficially interested. Courts of law, equally with courts of equity, gave effect to assignments like the one under consideration by controlling the proceeds of the judgment recovered for the benefit of the assignee.

II.

NEGOTIATION.

An instrument is negotiated when it is transferred from one party to another in such a way as to constitute the person receiving it the holder.

If the instrument is payable to bearer, negotiation may be by simple delivery.

If the instrument is payable to order, negotiation is by indorsement of the holder coupled with delivery. The indorsement must be written on the instrument itself, or upon a paper attached to it. It must be an indorsement of the entire instrument unless it has already been paid in part.

The indorsement may be:

1. Special. A special indorsement specifies the person to whom or to whose order the instrument is to be payable.
2. In blank. A blank indorsement does not specify any person to whom the indorsement is made and consequently makes the instrument payable to bearer. Any holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract which will not make his liability greater than it otherwise would be.
3. Restrictive. A restrictive indorsement is one which prohibits further negotiation and makes the indorsee the agent of the indorser. Such an indorsement gives the indorsee the right to receive payment; to bring any action which the indorser could bring; or to transfer his rights as a restrictive indorsee when the form of the indorsement allows it. All subsequent indorsees, however, acquire only the title of the first indorsee under the restrictive indorsement.
4. Qualified. A qualified indorsement makes the indorser a mere assignor of the title. Such an indorsement does not impair the negotiability of the instrument, but operates to relieve the indorser from liability.
5. Conditional. A conditional indorsement passes the title subject to a specified condition. The maker or any party liable on the instrument may disregard the condition, but the person to whom it is negotiated will hold it subject to the rights of the person indorsing conditionally.

When an instrument made payable to bearer is indorsed specially, it may be further negotiated by delivery. The person indorsing specially is liable as indorser only to such holders as take title through his indorsement.

An instrument originally negotiable continues to be negotiable until it has been restrictively indorsed or discharged. The holder of the instrument may at any time strike out any indorsement which is not necessary to his title, whereupon that indorser and all subsequent to him are relieved from liability.

The holder of an instrument may be a holder in due course or a holder not in due course. A holder in due course takes the instrument unaffected by equities between prior parties, and free from personal defenses available to them between themselves. He may hold any party to whom he can trace his title. Such a holder is one who has taken the instrument under the conditions that:

1. It is complete and regular upon its face.
2. He became the holder before it was overdue and without notice that it had been previously dishonored.
3. He took it in good faith and for value.
4. At the time it was negotiated to him, he had no notice of any defects in the instrument or in the title of the person negotiating it to him.

After maturity of the instrument, any person taking it takes subject to defenses available against the holder from whom he derives title. Every holder is deemed *prima facie* a holder in due course, but when it is found that the title of some one negotiating it to him is defective, the burden is upon him to show that he is such a holder.

The maker of a promissory note:

1. Agrees to pay it according to its tenor.
2. Admits the existence of the payee and his capacity to indorse.

The drawer of a bill of exchange or check engages that the person upon whom it is drawn will accept it and that if it is dishonored and the necessary legal steps taken, he will pay the amount of the instrument to the holder or to any subsequent indorser who may be compelled to pay it—unless he inserts a stipulation to the contrary.

The acceptor of a bill of exchange:

1. Admits the existence of the drawer.
2. Admits the genuineness of his signature.
3. Admits his capacity and authority to draw the instrument.
4. Admits that the holder has the ordinary rights of payee.

A person who places his signature upon the instrument in any capacity other than as one of these three parties is an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity. This is true under the statute even when such a signature is placed upon the instrument before delivery.

Every person who negotiates an instrument by delivery or qualified indorsement warrants that:

1. The instrument is genuine.
2. He has good title.
3. Prior parties had capacity to contract.
4. He has no knowledge of any fact which would impair the validity of the instrument.

Negotiation by delivery extends these warranties to the immediate transferee only.

In addition, persons negotiating without qualification:

1. Warrant that the instrument is valid at the time of the indorsement.
2. Agree that if it is dishonored and the necessary legal steps taken, they will pay the amount of the instrument to the holder or to any subsequent indorser who may be compelled to pay it.

Ordinarily indorsers are liable in the order in which they indorse, but an agreement between indorsers to some other effect may be shown.

A. How Negotiation is Made.

1. Definition.

Foster's Admr. v. Metcalfe. 144 Ky. 385.

Metcalfe made certain notes to the order of Foster, which were lost, but Foster's administrator now sues thereon. Metcalfe seeks to have the case dismissed because of the failure of the administrator to file a bond to protect him as maker of the note against possible liability to a holder in due course, although the note had not been indorsed.

Held, that a transferee cannot be a holder in due course of a note payable to order unless the note has been indorsed.

Clay, C. J.

Would a party holding the notes without an indorsement take them free from defenses?

Section 30 of the negotiable instruments act is as follows:

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if to order, it is negotiated by the indorsement of the holder, completed by delivery."

Section 49 of that act provides:

"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

From the foregoing it will be seen that an instrument payable to order is negotiated by the indorsement of the holder, completed by delivery, and that although a holder of an instrument payable to his order may transfer it for value without indorsing it, and thus vest in the transferee such title as the transferor had therein, together with the additional right to have the indorsement of the transferor, yet for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Considering section 49 of our act in connection with the other sections, we conclude that the holder of a note payable to order and not indorsed, is not a holder in due course. That being true, it follows that the notes sued upon, not being indorsed, were not transferable so as to cut off all defenses between the parties. It also follows that no tender of an indemnifying bond before bringing suit was necessary.

2. Forms of Indorsement.

Farnsworth v. Burdick. 94 Kas. 749.

Burdick made a note to the order of Wheeler, who negotiated it to Farnsworth by writing on the back of it words to the effect that he assigned the note to Farnsworth. The defense to a suit on the note is that on account of the form of indorsement, the plaintiff is not a holder in due course, and that defenses available against Wheeler are therefore open.

Held, that the indorsement constituted the plaintiff a holder in due course of the instrument.

Marshall, J.

Section 5283 reads in part:

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."

The note sued on was negotiated within the meaning of this section. It was transferred from Wheeler to Farnsworth, and he became the holder thereof.

Section 5284 reads:

"The indorsement must be written on the instrument itself or

upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."

This indorsement, if it is an indorsement, was written on the note itself.

Other sections of the statute are as follows:

"An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional."

"A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

"An indorsement is restrictive which either: (1) Prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person; but the mere absence of words implying power to negotiate does not make an indorsement restrictive.

"A restrictive indorsement confers upon the indorsee the right: (1) To receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so; but all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."

"A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse,' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

The indorsement in this case is special, in that it specifies the person to whom the note is made payable. It is absolute and unrestricted. It is not a qualified indorsement, unless the use of the word "assign" makes it a qualified indorsement. It is not a conditional indorsement.

Section 5305 reads:

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 5310 reads:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

If this note is complete and regular upon its face, if Farnsworth became the holder of it before it was overdue and without notice that it had been dishonored (there is no evidence to show that it was dishonored), if he took it in good faith and for value, if at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of J. A. Wheeler, then he became the holder thereof in due course, and took the note free from any such defect, and free from defenses available to these defendants against J. A. Wheeler, and may enforce payment for the full amount of the note, under the statute.

Section 5316 reads:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

When Wheeler placed his name on this note, he did not do it as maker, drawer, or acceptor, and is therefore deemed to be an indorser, unless the word "assign," used by him, indicates "his intention to be bound in some other capacity." The authorities seem to be in utter and hopeless confusion concerning the effect of the transfer of a negotiable instrument by words like those used here. This confusion existed prior to the passage of the uniform negotiable instruments law, and still exists. The weight of authority was, and is, that this is a commercial indorsement. We are of the opinion that the "assignment" of this note is an indorsement thereof under the negotiable instruments law; that Farnsworth is a holder in due course; and that the makers of the note cannot set up the defenses against the note that could have been set up against it in the hands of Wheeler.

3. Entire Instrument to Be Indorsed.

Offenstein v. Weygandt. 89 Kas. 739.

Mr. and Mrs. Offenstein made a note for \$750 secured by a real estate mortgage, payable to the order of Weygandt. They paid him the balance due and received a release. Upon their attempting to record the release, it appeared that Weygandt had assigned a one-third interest in the mortgage to another party, and the release was refused record. The Offensteins now sue Weygandt upon the theory that they may be called upon to pay this amount to the present holder.

Held, that a note must be indorsed in its entirety to constitute the assignee a holder in due course.

Porter, J.

The contention of Weygandt that no cause of action was stated, seems to us sound. The fact that plaintiffs owed the debt, that it

was due, and that the original note and mortgage, showing no indorsement or assignment of any character, were in the payee's possession and were delivered to them at the time the note was paid are all set forth in the pleadings. What right have plaintiffs to recover money which they have paid on a debt justly due from them? Their claim is, that because the assignment of a mortgage carries with it the debt, the partial assignment conveyed to the assignee a one-third interest of the note and that they are still liable to the assignee for the payment of \$250. But they had not paid it to the assignee, nor had it been demanded of them at the time this action was commenced. The defendant's main contention is that under the negotiable instrument law the partial assignment by a separate instrument could not make the assignee a holder in due course, and therefore that plaintiffs have a valid defense to any action which the assignee might bring against them.

Section 5284 provides that:

"The indorsement must be written on the instrument itself, or upon a paper attached thereto."

Section 5285 reads:

"The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorseees severally, does not operate as a negotiation of the instrument; but where the instrument has been paid in part, it may be indorsed as to the residue."

These requirements of the negotiable instrument law are essential in order to make the transferee a holder in due course. Since the assignee never became a holder in due course, the plaintiffs could have interposed the same defense of payment in an action brought against them by the assignee as if the defendant himself had sued them.

Of course, the plaintiffs were entitled to equitable relief. They should have brought all the parties into court and by offering to do equity, consenting that the \$250 payment be applied upon the debt, have asked for a decree that the mortgage be canceled and that they recover their costs.

4. Right of Holder to Complete Indorsement.

Consterdine v. Moore. 65 Neb. 291.

Thomas E. Moore made a note and mortgage to the Globe Investment Company, which indorsed the note to parties through whom the plaintiff holds as a holder in due course. This indorsement read: "Pay to the order of . . . without recourse. Globe Investment Company, J. Lowell Moore, Treas." The Bank of Miller bought the mortgaged premises from Moore, and after the note had left its hands, paid the amount of the mortgage to the

original payee. The plaintiff was not paid, and sues to foreclose the mortgage. The defense is based partly upon the contention that the incomplete special indorsement destroys the negotiability of the note.

Held, that an incomplete or blank indorsement may be filled out by a holder.

Sedgwick, J.

The first contention is that the plaintiff is not entitled to protection as an innocent bona fide indorsee under this indorsement. This contention cannot be sustained. A blank indorsement, until it is filled up and made special, is equivalent to a bill of exchange payable to bearer. The holder may, at his option, complete the indorsement by inserting the name of the indorsee; and this he can do either before or after he begins suit thereon. The holder, in filling the indorsement, may write any words over the name of the indorser which do not enlarge his liability as indorser. To fill the blank with the name of the indorsee would restrict the present indorsement, and is not necessary to the negotiability of the note.

In the case at bar the proof is clear that the payee sold the note in the regular course of business, indorsed its name thereon, and delivered it to the purchaser. Under such circumstances, there is no reason for holding that the incomplete special indorsement written by the payee over its name would affect the negotiability of the note in the hands of subsequent holders.

5. Negotiation by Delivery of Instrument Specially Indorsed.

Johnson and Bedford v. Mitchell. 50 Tex. 212.

Johnson and Bedford made a note payable to Crabtree or bearer. Crabtree indorsed the note as follows: "I hereby assign the within note to S. L. Gilbert for value received, and guarantee the solvency of the makers of said note, 11th of September, 1873.—J. W. Crabtree." Mitchell, who sues the makers, bought the note from Gilbert, to whom it was transferred by Crabtree, and accepted it without the indorsement of Gilbert.

Held, that a note payable to bearer may be negotiated by delivery although it has been specially indorsed.

Gould, J.

According to the elementary authorities, a bill or note payable to order and indorsed in blank, so long as the indorsement continues blank, "is in effect payable to bearer."

Lord Mansfield said: "I see no difference between a note indorsed in blank and one payable to bearer;" and Chancellor Kent said: "A note indorsed in blank and one payable to bearer are of the

same nature. They both go by delivery, and possession passes property in both cases." So "a note payable to the maker's order becomes, in legal effect, when indorsed in blank, a note payable to bearer."

From these authorities, we conclude that Mitchell's possession was at least as satisfactory evidence of his ownership as it would have been had the note been payable to Crabtree or order, indorsed in blank by Crabtree, and then indorsed in full by Gilbert and some one other than Mitchell.

The negotiability of a note payable to bearer is certainly not further restrained by an indorsement in full than would be, by the same indorsement, the negotiability of a note payable to order and indorsed in blank by the payee. But the rule is well settled that "if a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself title must be made through his indorsee."

We conclude, then, that however it might have been as against Crabtree, on which point we express no opinion, as against the makers of the note, its production by Mitchell was sufficient evidence of title.

6. Transfer After Maturity.

Capwell v. Machon. 21 R. I. 520.

Hedley made a note to the order of Machon. Machon indorsed it to Tingley, who discounted it at a bank. The note was not paid at maturity. After the indorsers were notified of non-payment, the plaintiff bought the note for full value. He now sues the indorsers.

Held, that a note may be transferred after maturity and the purchaser may sue thereon.

Stiness, J.

The defendants claim that the act of the plaintiff, he being a stranger to the note, amounted, *ipso facto*, to a payment.

The fact that a negotiable note is transferred after maturity is not important, except as to equities between prior parties, which are not set up in this case. The mere fact that it is overdue does not deprive it of its negotiable character. It may still pass from hand to hand *ad infinitum*. The note in this case was indorsed in blank, and title to it passed by delivery. In such cases a transfer to a stranger raises no legal presumption of payment. "A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intended to extinguish the coupons when he hands over the sum called for by them and takes

them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act."

Title to the note, indorsed in blank, passed by delivery, irrespective of an express assent to a transfer by the holder, and the question of payment or transfer was a question of fact.

7. Right of Holder to Strike Out Indorsement.

Jerman v. Edwards, 29 App. (D. C.) 535.

Ada F. Edwards, as holder, sues Tullock as maker, and Jerman as indorser, of a note made by Tullock payable to the order of Jerman. The note was indorsed in blank by Jerman, and afterwards restrictively indorsed by B. F. Edwards and by a bank. The plaintiff claims the right to strike out the restrictive indorsement and hold under the blank indorsement.

Held, that an owner of a negotiable instrument may strike out any indorsement not necessary to his title.

Shepard, C. J.

Assuming, as contended for the appellants, that the note had been actually indorsed by Benjamin F. Edwards to the savings bank for collection for his account, the bank failed to collect it, and returned it presumably to him. Plaintiff's title as holder did not pass under that indorsement, but through the delivery to her by Benjamin F. Edwards, who appeared as a witness on her behalf. She took title by delivery under the blank indorsement of the payee, Jerman, the effect of which was to make the note payable to bearer, and pass by delivery. Whether the further indorsement, if in fact made by Benjamin F. Edwards, was a restrictive one, is a question of no materiality, as the plaintiff did not claim the title thereunder, and there was no defense to the note as against either Benjamin F. Edwards, the savings bank, or the plaintiff. This indorsement not being necessary to the title of the plaintiff, she had the right to strike it out. This provision of the Code is but declaratory of the law as it was recognized before the adoption of the negotiable instruments act.

8. General and Qualified Indorsement.

Copeland v. Burk, 59 Okla. 219.

Messengill made a note to Burk, who for value transferred it to Copeland by writing on the back: "I transfer my right, title and interest in same. J. M. Burk." Copeland sues Burk as an indorser of the note. Burk contends that this was a qualified indorsement.

Held, that a statement of assignment of a note is a general indorsement.

Edwards, C.

The case must be determined by the meaning and effect to be given the words preceding the signature of the defendant upon the back of the note in controversy. Do the words used constitute the defendant an indorser in due course, and as such liable for the payment of the note, or, is he a mere assignor? Sections 4088 and 4113, Revised Law 1910, with reference to qualified indorsement, read as follows:

"Qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'Without recourse,' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

It will be seen that a special indorsement does not destroy the negotiability of a note, and the question of negotiability does not enter into the case. There are two widely divergent lines of authority in cases of this kind, one line holding that a memorandum of similar import to that here used exempts the indorser from personal liability or constitutes him a mere assignor. One of the leading cases sustaining this line of holding is *Hailey v. Falconer*, 32 Ala. 536, in which it is held that an indorsement in these words:

"For value received this 28th day of February, 1850, I transfer unto John P. Hailey all my right and title in the within note, to be enjoyed in the same manner as may have been by me"

—exempts the indorser from personal liability on the note.

The other line of authority is to the effect that an indorser, in order to limit his personal liability, must do so by words clearly expressing such intent.

"The question arising in such cases is a nice one, and depends upon rules of legal interpretation. The mere signature of the payee, indorsed on the paper, imports an executed contract of assignment, with its implications, and also an executory contract of conditional liability, with its implications. The assignment would be as complete by the mere signature as with the words of assignment written over it. The conditional liability which is executory is implied by the executed contract of assignment and the signature under it, which carries the legal title; and the question is, Does the writing over a signature of an express assignment, which the law imports from the signature *per se*, exclude and negative the idea of conditional liability, which the law also imports if such assignment were not expressed in full? We think not. When the thing done creates the implication of another to be done, we cannot think that the mere expression of the former in full can be regarded as excluding its consequences, when that consequence would follow if the expression were omitted."

In these modern times commercial paper has come to play a very large part in the business life of the country. Commerce is carried on by means of business credit. Commercial paper in great volume continuously passes current by indorsement. The effect of and the liability incurred by an indorsement is a matter of common knowledge. The phrase, "without recourse," as employed in such business transactions, is in everyday use, and we can hardly conceive of a person engaged in business affairs of importance, as was the defendant in this case, who is not familiar with its use and meaning. If the defendant did not intend to be bound by his indorsement on the note in question, he should have used some words which would clearly indicate that he was not an ordinary indorser. The very terms of our statute (section 4088, Revised Laws 1910), *supra*, specify that the indorsement may be qualified by the use of the words, "without recourse," or words of similar import. In our judgment the defendant has not so qualified his indorsement and is liable.

9. Restrictive Indorsement.

National Bank of Commerce v. Bossemeyer. 101 Neb. 96.

Bossemeyer drew a draft upon a firm in New Mexico for \$729 and attached a bill of lading for a car of grain consigned to his order. He deposited the draft in the First National Bank of Superior, which forwarded the draft to the plaintiff bank for collection. The draft was indorsed by the Superior bank as follows: "Pay to any bank or banker. All previous indorsements guaranteed." The Superior bank then suspended payment. Bossemeyer caused the grain to be delivered, and notified the drawee not to pay the draft, but to pay directly to him. The plaintiff bank had credited the Superior bank with the amount of the draft and now sues Bossemeyer upon it. He defends on the ground that the indorsement by the Superior bank was restrictive, and that consequently the plaintiff bank is not a holder in due course.

Held, that the form of indorsement specified does not constitute a restrictive indorsement.

Letton, J.

Is the indorsement restrictive? Whatever may have been held before the enactment of the negotiable instruments act, it is clear that this question must be determined by the provisions of that statute. "An indorsement is restrictive which either: First—prohibits the further negotiation of the instrument; or, second—constitutes the indorsee the agent of the indorser; or third—vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

There is nothing on the face of this indorsement which prohibits the further negotiation of the instrument or constitutes the indorsee the agent of the indorser, or vests title in the indorsee in trust for the use of some other person, and hence, by the most elementary principles of statutory construction, the plain meaning of the language must be observed, and it must be held that the indorsement was not restrictive.

In a case which was decided before the negotiable instruments act went into effect in [Missouri], it was held, without any discussion of the reasons, that an indorsement such as this was a restrictive indorsement. In three cases decided in that state after the act was in force the same ruling was made; but in none of these cases was the language of the statute considered, and the holding is placed upon the authority of the first case, which, as we have seen, was decided before the act took effect. These cases are not authority upon the proposition as to whether such an indorsement is restrictive under the provisions of the act. Furthermore, any bank receiving a draft with such an indorsement has the right to again indorse it in blank or payable to any particular bank or person. This, of course, it would have no power to do if the indorsement was restrictive. If, however, the words "for credit," "for account," "for collection and return," had been added, the character of the indorsement would have been changed entirely, and it would have been restrictive, showing upon its face that the indorsee bank took it only as a collecting agent, and not as a holder for value.

The practice of indorsing checks "for collection," "for account," had become almost universal, but when it was decided by the supreme courts of New York and Missouri that the drawee bank could not recover back money paid upon a forged draft in the one case from a collecting bank, or in the other from the bank owning the draft, "it startled the banks located in large cities, and awakened them to the dangers attending the payment of such drafts or bills, and the result was that in the year 1896 the clearing house in the city of New York adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements, such as 'for collection,' or 'for account of,' unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other cities, and in some of them all indorsements are required to be either in blank, or 'pay to . . . or order.' By this action of the clearing houses, indorsements 'for collection,' or 'for account of,' have fallen into disuse, and the banking business of the country is now done, almost universally, upon unrestricted indorsements." We conclude, then, that the indorsement by the Superior bank was general, and not restrictive.

Does the fact that, if protested, the Lincoln bank was entitled to charge back the amount of the draft and protest fees constitute it merely an agent for collection and not a holder in due course? While

there is some conflict in the authorities, the better view is that the deposit of a check or draft in a bank with a general indorsement and the giving of credit for its amount by the bank to the depositor, in the absence of other evidence as to the intention of the parties, passes the title to the bank and makes it a holder for value, entitled to recourse on prior indorsers upon the protest of the paper. In other words, when such a state of facts is proved there is a *prima facie* case made that the title has passed, and the fact that it, the receiving bank, may charge back a protested draft does not affect the relation.

10. Right of Restrictive Indorsee to Sue.

Haskell v. Avery. 181 Mass. 106.

Haskell sues to establish a note as a claim against the estate of Edward Avery, an indorser upon it. The note was as follows:

"\$155. Boston, May 6th, 1895. Four months after date I promise to pay to the order of Edward Avery One Hundred and Fifty-five Dollars. Payable at any bank in Boston. Value received. James T. Moore."

The note was specially indorsed by Avery and others, restrictively indorsed by Neher, and finally restrictively indorsed by the National Bank of Florida. Haskell was admitted to be the lawful holder.

Held, that a restrictive indorsement does not preclude a holder under it from suing upon the instrument.

Holmes, C. J.

The only question is whether the holder of the note can prove in his own name. To decide this it is necessary to consider the purport and effect of two indorsements. The first is that of Neher: "For deposit in the National Bank of the State of Florida, Jacksonville, Fla., to credit of E. J. Neher." Neher's name is a signature although it also makes a part of a sentence. The signature is often made part of the last sentence of a letter, but no one ever thought, we suppose, that it was less a signature on that account. The indorsement then is in effect the same as if it read "For deposit to my credit. E. J. Neher." Such an indorsement is restrictive in the sense that it gives notice of the trust to any one who should take the note thereafter, and therefore makes it impossible for one who should discount it for the holder to retain the proceeds, when collected, to his own use. But there seems to be no reason for denying that it gave to the Florida National Bank the right to collect the note and to that end to bring a suit, if necessary, in its own name. In other words,

there seems to be no reason for denying that it gave the bank the legal title to the note, as the bank certainly would have owned the proceeds of the note when collected, and thereafter would have been simply a debtor to Neher for the amount. It does not matter if the title was voidable in case the depositor should have seen fit to revoke his mandate, or the bank had returned the paper upon a failure to collect.

If these preliminaries are admitted, there is not much more difficulty in taking the next step. The very purpose of indorsing a note payable in Boston to a Florida bank for deposit is that the Florida bank should get the note collected and make itself the depositor's debtor by the usual measures. Those, it is well known, are the indorsements through intervening banks to a bank or person in Boston. The fact that the words "or order" were not added did not, of itself, limit the power of the bank to indorse. And the fact that the indorsement to the bank was restrictive in the sense that it disclosed a trust did not prevent the bank from passing the legal title subject to the trust to the Boston bank or person ultimately called upon to collect. This is in accordance with reason, has the sanction of Massachusetts authority as well as of other courts, and seems to be established as the law for future transactions by statute.

For these reasons the appellant should have been allowed to prove his claim.

B. Holders in Due Course.

1. Rights in General.

Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.
122 Tenn. 415.

Chapman-White-Lyons Company made a note to the Hagey Stove Company, which was discounted by the plaintiff bank. The defense is that the note was made by an officer of the defendant corporation for the purchase of stock in behalf of the company; that this could not lawfully be done under its charter, and that the note was therefore entirely void.

Held, that a holder in due course takes a note free from defects of title of prior parties.

McAlister, J.

The insistence on behalf of appellant is that the note in controversy was executed for an unlawful purpose, namely, the purchase by one corporation of stock in another corporation, in contravention of the public policy of this state, and that the note is not merely voidable, but absolutely void.

We are clearly of opinion that under the authorities, as between the drawer and drawee of the note, it was *ultra vires* and non-collectible; but a different question is presented when the note is found in the hands of an innocent purchaser before maturity in due course of trade. If the Chapman-White-Lyons Company, a corporation, had been entirely destitute of any authority to execute negotiable paper under its charter, then such paper would be void, even in the hands of an innocent purchaser for value; but, where it appears that the charter of a corporation confers express power to make bills and notes in the course of its business, the fact that it transcended the power conferred in its charter and executed a negotiable instrument for a matter beyond the scope of its business would not destroy the negotiability of the note and render it void in the hands of an innocent purchaser for value.

2. Who are Holders in Due Course.

Hodge v. Smith. 130 Wis. 326.

Smith made notes payable to the order of Burgess & Sons, of which the plaintiffs are the holders. Burgess & Sons negotiated the notes in violation of an agreement to hold them until fourteen persons in all should sign them. The plaintiffs, bankers, credited the notes upon a checking account of the payees. Upon these facts, the defense is made that the plaintiffs are not holders in due course.

Held, that crediting a note to an account of the seller does not constitute the transferee a holder in due course.

Marshall, J.

Sec. 1676-22 of the Negotiable Instrument statute provides that:

"A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.
5. That he took it in the usual course of business."

It will be observed that, in harmony with elementary principles, one of the important incidents of the transfer of negotiable paper, essential to the transferee becoming a holder in due course, is the actual payment therefor. So what constitutes payment, when there

is not an actual transition of the money equivalent from the purchaser of the paper to the seller at the time of the transfer, has often been a subject of consideration. Such circumstances as we have here, that is, the sale of a note before due and placing the consideration to the credit of the vendor upon the books of the purchaser subject to the former's check, have been held not to be a taking for value so as to render the new holder a purchaser in due course, except to the extent of the money actually drawn and charged against such credit.

"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid therefor the full amount agreed to be paid, he will be deemed a holder in due course only to the extent of the amount therefor paid by him."

Since in this case the evidence conclusively shows that when appellants took the notes from the original holder they placed the consideration to the credit of the latter, and there is no proof that the credit was thereafter exhausted in whole or in part by payment of money on account thereof, there was a failure of proof that appellants became holders of the papers in due course so as to cure the infirmities therein, unless the mere production thereof was sufficient to make out a *prima facie* case in that regard. On that the learned trial court decided in the negative, and seems in so doing to have followed the written law, as indicated by sec. 1676-25 of the Negotiable Instrument Law, which covers the subject in these words:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud . . . or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

So as we have seen the title of the original holders of the papers in question was defective. They negotiated such papers in bad faith as to all who signed conditionally, and as to others, if any there were, their signatures were obtained by fraud. The purchaser of commercial paper under such circumstances occupies a materially different position, when he attempts to judicially enforce it, from that occupied by one who has taken a note as indorsee, which in the hands of the original holder is subject to a defense not based on the title of the latter being defective or his signature having been obtained by fraud. Ordinarily the second holder is presumed, in the absence of evidence to the contrary, to have taken the paper in due course and before maturity. But the rule in this state and generally, independent of the written law, is that where circumstances exist rendering the title of the original holder defective, or showing fraud in obtaining the paper, the burden is on the second holder to go further than to merely produce such paper. He cannot rely upon the mere presumption which obtains, generally, but must carry the burden of showing that he is a holder in due course by proving facts sufficient to establish it.

3. What Constitutes Value.

People's State Bank v. Miller. 185 Mich. 565.

Miller gave a check for stock which he bought through a firm of brokers. The stock was not delivered to him in accordance with his instructions. The brokerage firm failed and Miller stopped payment of the check. The bank sues Miller, who defends in part on the ground that the bank had merely credited the brokers' account with the amount of the check and had not actually paid money upon it.

Held, that until collection of the amount due, a collecting bank is not a holder in due course of a check deposited with it.

Kuhn, J.

It seems to be a general rule that when checks or other commercial paper are deposited in a bank indorsed "for collection," or where there is a definite understanding that such is the purpose of the parties at the time of the deposit, the title to the paper remains in the depositor. And the mere fact that the depositor is allowed to check against the credit does not change the import of the transaction, so as to preclude the bank from charging back the amount of credit if the check deposited is not paid. The bank may, as a matter of favor and convenience, permit checks to be drawn against it before payment; the depositor, in the event of nonpayment, being responsible for the sums drawn, not by reason of his indorsement, the check not having ceased to be his property, but for money paid.

"The question is one of the agreement of the parties, either express or implied, from the general course of business between them. There can be no doubt that, if a draft or other paper is delivered to a bank for collection, the mere fact that the indorsement of the owner is unrestricted will not, as between him and the bank, make the latter the owner of the property."

"Neither is it conclusive upon the question of ownership of the paper that before collection the amount of it is credited to the customer's account, against which he has the privilege of drawing by check. It has been frequently held, with the approval of the best text-writers, that if paper is delivered by a customer to a bank for collection, or 'for collection and credit,' a credit of the amount to the customer before and in anticipation of collection will be deemed merely provisional, and the privilege of drawing against it merely gratuitous, and that the bank may cancel the credit or charge back the paper to the customer's account, if it is not paid by the maker or drawee. The right of banks to do this in case of the deposit of checks on other banks, without any special contract, is generally exercised and recognized. This is inconsistent with the idea that the title to the checks passes absolutely to the bank, and is only consistent with

the theory that the bank is the agent of the customer for collection, notwithstanding the credit of the latter."

Of course, in all such cases the banker, like a factor, has a lien for advances made on the faith of the paper, and consequently the claim of the customer may be modified by the state of his account.

Under the contract here entered into between the bank and the brokerage concern, it is clear that the bank became the latter's agent for collection of the checks, and could not, it is needless to suggest, be the owner of the paper at the same time.

4. Instrument to Be Complete and Regular Upon Its Face.

In re Estate Philpott. 169 Ia. 555.

Philpott agreed to purchase land from a Land Company, for which he gave his notes. Later, the contract with the Land Company was canceled and it was agreed that the notes should be returned. They were not returned, but were indorsed to the plaintiff who is a holder in due course, and who sues upon them. One of them was payable "on or before four . . . after date," and the defendant contends that the note was not complete and regular upon its face, and that the plaintiff is therefore not a holder in due course.

Held, that a note negotiated with unfilled blanks is not complete and regular upon its face.

Evans, J.

It was drawn payable "on or before four—after date." It does not appear therein whether it was to become payable in four days, four months, or four years. The defendant contends that, because of this defect, the time of maturity was rendered uncertain and the negotiability of the instrument was thereby destroyed. On the other hand, plaintiff contends that inasmuch as no time of payment was actually expressed, it became a note payable on demand. Adopting for the moment the plaintiff's contention at this point, and reading the note as payable on demand, another difficulty confronts him. Upon the negotiating of such a note an unreasonable length of time after its issue, the holder is not deemed a holder in due course. In this case the date of issue was June 12, 1911, and that of negotiating, January 18, 1912. Under the authorities, a reasonable time for the negotiating of a demand note is rather brief. Its dishonor is not long delayed. In the cases, two days, seven days, and thirty days were held to be a reasonable time.

This note was not "complete and regular" upon its face. It indicated upon its face that some word had been omitted in an attempted specification of the time of payment.

If it were made to appear that the real contract between the parties was that the note should be payable in four months or four

years, the instrument was reformable in equity at the suit of either party. This would not destroy the validity of the note, but it would destroy its negotiability until such reformation was had. The manifest irregularity in this case is not one of the "omissions" specified in Sec. 3060-a6, which section is as follows:

"The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument."

Sec. 3060-a14 provides for the filling of blanks by the holder of an instrument duly signed within the scope of the holder's authority as follows:

"Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Such instrument is thereby rendered negotiable. But it becomes so after the blanks are filled and not before. If the real intent of the parties in interest was to make this instrument payable in four years, it may be that the payee could have lawfully corrected the oversight by inserting the word "years;" and it may be also that this would have rendered the note negotiable to a holder in due course as defined in the section above quoted. The question in that form is not now before us and we need not pass upon it. We think it quite clear that this irregularity upon the face of the note prevented its taker from becoming a holder in due course. It could be deemed a demand note, unless the agreement of the parties was in fact otherwise. If otherwise, such fact was suggested by the incompleteness of the terms actually used.

The controlling fact at this point is, not that the blank was not

filled, but that it was filled imperfectly or irregularly. Though we grant that the note was presumptively good as a demand note, yet it was not "complete and regular" within the requirements of Sec. 3060-a52, and therefore was not negotiable.

5. What Constitutes Good Faith.

Smathers & Co. v. Toxaway Hotel Co. 162 N. C. 346.

The Toxaway Hotel Company sold personal property to Jacobs in return for notes which the Hotel Company indorsed to other parties. The plaintiffs, creditors of the Hotel Company, seek to set aside the transaction on the ground that it was fraudulent against creditors. They also assert that the transferees of the notes took them under such circumstances that they might have discovered the fraud.

Held, that a person may be a holder in due course unless he has actual notice of bad faith.

Hoke, J.

Our statute on negotiable instruments makes provision as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The question as to what is the character of notice required to affect the status of one claiming to be the holder in due course of a negotiable instrument has been subject to some fluctuation in the courts and has given rise to much contrariety of decision. As shown in the learned and suggestive argument and brief with which we were favored by counsel for appellant, the doctrine for a time prevailed in England that the holder was put upon inquiry by facts or circumstances which would induce a cautious and prudent man to make one, and was affected by notice or knowledge of conditions which such inquiry would disclose. This seems not to have been the rule as it first obtained in the English courts, and later they returned to the original position, and it has been long firmly established there that, in this respect, the title of the holder can only be impugned by showing direct knowledge of the infirmity or notice of such facts as would make the acquisition of the instrument amount to bad faith.

6. What Constitutes Notice of Infirmity in Instrument.

Fidelity Trust Co. v. Whitehead. 165 N. C. 74.

Whitehead was one of the makers of a note to McLaughlin Brothers, which they procured by fraud as part payment of the

purchase price of a French coach horse. The note was sold by them to the bank after one instalment of interest was past due. The question arises whether the bank could take the note as a holder in due course, after interest was overdue.

Held, that it is a question for the jury whether the purchaser takes a note upon which interest is past due without notice of infirmity in the instrument.

Clark, C. J.

As to the abstract proposition, for such it was in this case, "where a note is payable on a future day, with interest payable at stated periods before the maturity of the principal of the note, whether the nonpayment of the instalments of interest is notice of dishonor," the authorities are divided. It is held [that] "Where a note is payable at a future day, with interest payable annually, the payment of interest annually is as much a part of the agreement as a promise to pay the principal. It is a portion of the debt, and if when the note is bought by a third party the interest is past due, the note is then dishonored."

There are cases which hold to the contrary, and "The weight of authority is that the bona fide purchaser for value is within the protection of the law merchant, although interest is overdue and unpaid at the time of the purchase." We think, however, that there is a distinction between nonpayment of interest on an ordinary negotiable instrument and nonpayment of coupons upon municipal and other bonds referred to in many decisions.

We do not need, however, to confine ourselves to either of these two lines of decision, for this case does not depend upon that one circumstance of the nonpayment of interest. Even if it did, there is a line of authorities which holds that while the nonpayment of interest, falling due at stated periods before the maturity of the principal of the note, is not of itself notice of dishonor, it is a circumstance for the consideration of the jury on the issue whether the plaintiff took it "in good faith and without notice of dishonor."

7. Taking After Maturity.

Bassenhorst v. Wilby. 45 *Oh. St.* 333.

After it was due, Bassenhorst sold and indorsed to Wilby a note of which he was the holder. Upon failure of the maker to pay it on demand some three and one-half months later, Wilby sues Bassenhorst as indorser. Bassenhorst contends that Wilby's negligence in making demand has released him from liability.

Held, that an instrument must be presented within a reasonable time in order to hold an indorser negotiating it after maturity.

Minshall, J.

A promissory note payable to one or his order is none the less negotiable because overdue. After its maturity it can no longer be transferred so as to deprive the maker of any defense he may have against the original holder. But this is the principal, if not the only, effect which maturity has upon the character of such paper. It can still be transferred so that the transferee will take the legal title; and it may be indorsed, and when indorsed, unless without recourse, the indorser becomes liable to the indorsee, if the note is presented to the maker for payment in a reasonable time, and notice is given the indorser, in case of nonpayment. The legal effect of indorsing an overdue promissory note, negotiable in form, is generally held to be the equivalent of an inland bill of exchange, drawn by the indorser on the maker of the note payable to the indorsee at sight or on demand; and by its analogy in this regard, the duty of the indorsee of such a note, if he would hold the indorser, is generally determined. As the duty of the holder of such a bill is to present it for payment in a reasonable time, a like duty devolves upon the [indorsee] of such a note. The indorsement of a note, due or not due, always expresses a conditional as opposed to an absolute obligation. The indorsement of a note overdue, has been invested by the modern decisions with a very distinct character. It is a bill of exchange drawn upon the party primarily liable, payable at sight. In this theory, the necessity of demand and notice is an essential element; not notice on a given day, as in the case of a maturing note, possible in that case, but impossible in the other, for the day appointed by the former maker and the new acceptor has passed; but notice after the holder has had reasonable time to make the demand on the maker, and has employed that time with diligence.

As to what is a reasonable time has been regarded as a question of some difficulty. But in a case like this, the only reasonable rule which can be adopted is to require due diligence in presenting the note to the maker for payment. It is said in one case "if the indorsement be made after the note falls due, the demand of payment must be made as if the note fell due on the day of the indorsement." But the general, and better rule, is the one just stated.

Where a thing is required to be done, and may be done presently, a reasonable time in which to do it necessarily excludes any delay, that, in the exercise of reasonable diligence, could have been avoided; so that a reasonable time in which to fix the liability of the indorser of an overdue promissory note, should be such as, under the circumstances, will enable the holder, in the exercise of due diligence, to present it for payment; and any delay that may, by the exercise of such diligence, be avoided, should be treated as negligence, and deprive the holder of the right to look to the indorser.

We are clearly of the opinion that the note was not presented for payment to the makers in the requisite time to charge the defendant below as an indorser of it.

8. Holder Subsequently Receiving Notice.

Miller v. Marks. 46 *Ut.* 257.

Conrad obtained a note from Marks by fraud. Miller bought the note from Conrad for \$100 in cash and two checks. After Miller had bought the note, but before the checks were paid by the bank, Marks informed him that the note was procured by fraud, and now defends on the ground that Miller is for that reason not a holder in due course.

Held, that a person who receives notice after he has purchased an instrument is not affected thereby.

Straup, J.

Notice affecting the holder must exist at the time he acquires title; for then his relation to it is fixed. But, if notice is received before he pays for the paper, although the contract has been entered into, he is not on a footing of a bona fide holder without notice; if he paid a part before notice, he is protected only to that extent. That also is the statute. Hence the important factor here is, "What constituted payment, and when was it made?"

To constitute payment to protect a purchaser the consideration, of course, need not be money—cash paid. It may consist of anything constituting a valid consideration of sufficient value. Giving or surrendering that is as much payment as money paid.

Where, as here, negotiable checks are exchanged for a negotiable note when each is an independent obligation and a sufficient consideration for the other, the purchaser has made payment when the instruments are delivered and the exchange is complete, unless the checks were not, nor intended to be, the consideration for the note, or unless the real transaction constituted nothing more than a mere executory agreement or promise to pay at some future time. Of course, as to Conrad receiving the checks, they were not payment until paid, unless expressly accepted as absolute payment. But when paid, payment, even as to him, related back to the time when the checks were delivered. Upon such an unconditional and completed exchange the transaction is consummated upon the delivery of the papers, and the rights and obligations of the parties fixed, which cannot be affected by any subsequent notice.

We are of the opinion that the plaintiff acquired title as a holder in due course.

9. Holder Taking Title Through Holder in Due Course.

Cover v. Myers. 75 *Md.* 406.

Myers made a note payable to Huddle or bearer, which was transferred without indorsement by Huddle to Thomas, who sold

it to Cover before maturity, but under circumstances which should have put him upon inquiry. The consideration for the note was wheat sold by Huddle to Myers, coupled with an agreement to sell for Myers double the quantity purchased by him at the same exorbitant price. The whole transaction was in fact nothing more than a fraudulent device for the securing of money. Cover sues upon the note.

Held, that a holder of a note, not himself a holder in due course, may recover upon it if he takes title through a holder for value.

Alvey, C. J.

It is a well settled doctrine applicable to these cases that where a negotiable instrument is originally infected with fraud, invalidity, or illegality, the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation, and no other, falls with it. But if any subsequent holder takes the instrument in good faith and for value, before maturity, he is entitled to recover on it, and so any person taking title under him may recover, notwithstanding such latter holder may have knowledge of the infirmities of the instrument; and all that is required of the holder in such case is, that it be proved that he, or some preceding holder or indorsee under whom he claims, acquired title to the paper before maturity, bona fide and for value.

Therefore, if Thomas, under whom the plaintiff asserts title to the note, was in fact a bona fide purchaser or holder of the note for value, then the plaintiff, notwithstanding any knowledge that he may have had at the time of the indorsement to him of the fraudulent origin of the note, would be entitled to recover by virtue of the right acquired from Thomas. In such case the plaintiff would succeed to all the rights of Thomas, and would be entitled to enforce them. For the rule is now well settled "that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition. This doctrine, as well as the one which protects the purchaser without notice, 'is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy.' The only exceptions to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract; or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction."

It was therefore incumbent upon the plaintiff, to entitle him to recover, to prove either that he became [a] bona fide purchaser of the note for value before maturity, or that he purchased the note from

Thomas, and that the latter had acquired title to the note *bona fide* and for value, before maturity, and that it was as successor to the right and title of Thomas that he sought to recover. If, however, Thomas was but an agent of Huddle to get off the paper, the note being payable to bearer, the title of Thomas would be no better than that of his principal, and his title to the note would be infected with the fraud of the origin of the note. But whether Thomas was agent or not, if both he and the plaintiff had knowledge of the infirmities or fraudulent origin of the note at the time they respectively became holders thereof; or if they colluded together for the purpose of avoiding the effect of such knowledge, and of placing a colorable title in the plaintiff, to enable him to sue for the recovery of the note, then, clearly, there can be no recovery by the plaintiff. And such knowledge of the fraudulent origin of the note may be shown to have been possessed by the parties either by direct proof, or by facts and circumstances that fairly lead to that conclusion.

10. Rights of Holder Upon Void Instrument.

Sabine v. Paine. 223 N. Y. 401.

The defendant made a note for \$2,100 to Vacheron upon usurious consideration. Vacheron then sold it to the plaintiff, a holder in due course, who sues upon it.

Held, that when a note is void in its inception, a holder in due course cannot enforce it

Collin, J.

When the Negotiable Instruments Law was enacted, it was an established rule of law in this state and many other jurisdictions that a holder of a note void by virtue of a statutory declaration because of usury, who became such before the maturity of the note for value and without notice of the usury, could not enforce the note. The rule is an exception to the general principle that a negotiable instrument, in the hands of an innocent holder, who had received it in good faith in the ordinary course of business, for value, and without notice of a defense, is not invalid and is enforceable by the holder. The general principle has been stated: "The *bona fide* holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed *mala in se* and those founded in positive statutory prohibition which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect." The rule, constituting

an exception to it, rests upon the legislative intention and enactment. An instrument which a statute, expressly or through necessary implication, declares void, strictly speaking, is a *simulacrum* only. It is without legal efficacy. It cannot obligate a party or support a right. A note void in its inception for usury continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade. The fact that the holder when he took the paper did not know that it had had no inception—that no prior party could sue upon it, and that he was loaning money upon it, does not affect the rule. He is bound to know the character of the paper he is dealing in.

C. Contracts of Parties.

1. Rules Under Negotiable Instruments Law.

Revised Laws of Massachusetts. Chapter 73.

Section 77. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

Section 78. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it is dishonored, and the necessary proceedings on dishonor are duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

Section 82. Every person negotiating an instrument by delivery or by qualified indorsement warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

Section 83. Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it is dishonored, and the necessary proceedings on dishonor are duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

2. Maker.

Wolke v. Kuhne. 109 Ind. 313.

Wolke as principal and Trentman as surety made a note to the order of Woollen, the attorney general of the state, from whom Kuhne took title as a holder in due course. The defendants assert that Woollen had no right to transfer the note executed to him.

Held, that the maker of a promissory note warrants the capacity of the payee to indorse.

Elliott, C. J.

The appellants are not in a situation to dispute the authority of the payee to accept and transfer the note executed by them. Whatever may be the right of the state, it is certain these appellants cannot successfully present the question of the authority of T. W. Woollen to take or transfer the note executed to him. That is a question between him and the state, with which these appellants have no concern, for they have executed a commercial note, fair on its face and complete in all its parts, and they can not defeat it in the hands of a bona fide holder.

The makers of a note negotiable under the law merchant warrant the capacity of the payee to transfer it in the usual course of business. The execution of a negotiable note is a warranty of the existing capacity of the payee to indorse the paper. The person to whose order a bill or note is made payable, is generally vested with the right to transfer the same by indorsement; and it does not lie with the maker or acceptor to dispute the power of the payee to indorse and transfer the instrument. By making the note or accepting the bill, and issuing it, the maker and acceptor assert to the world the competency of the payee to negotiate and assign the paper; and they are not afterwards permitted to gainsay the assertion so made.

3. Acceptor.

Heuertematte v. Morris. 101 N. Y. 63.

Heuertematte drew a draft on Christofel payable to Hourquet & Poylo, who indorsed it to Runnels for collection. The entire transaction was for the accommodation of Heuertematte, who desired to collect a debt from Christofel. Runnels, after making the collection, sent to Heuertematte his own draft on Morris, which was accepted by Morris. Morris, in a suit by Heuertematte on the draft drawn by Runnels, defends on the ground that his acceptance was induced by fraudulent representations on the part of Runnels.

Held, that an acceptor admits the authority of the drawer to draw upon him.

Ruger, C. J.

If a party becomes a bona fide holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can of course upon presentment refuse to accept a bill, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept a bill, he becomes primarily liable for its payment, not only to its indorsees but also to the drawer himself.

The delivery of a bill or check by one person to another for value implies a representation on the part of the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawee is not allowed to retract. By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, is not afterward at liberty to controvert the fact as against a bona fide holder for value of the bill.

The payment to the drawer of the purchase-price furnishes a good consideration for the acceptance which he then undertakes shall be made, and its subsequent performance by the drawee is only the fulfilment of the contract which the drawer represents he is authorized by the drawee to make.

The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration, or for accommodation, as against a bona fide holder for value of such paper, flows logically from the conclusive force given to his admission of funds, and is elementary.

4. Acceptor.

Cherokee National Bank v. Union Trust Company. 33 Okla. 342.

Caldwell presented to the Union Trust Company a check drawn on the plaintiff bank payable to the order of Smith, and indorsed by Smith, Sanders and Temples. The defendant cashed the check, indorsed it and forwarded it for collection; the plaintiff paid the check, but later discovered that the signature was a forgery. It attempts to recover from the defendant the money so paid, relying upon the indorsement of the defendant.

Held, that the drawee by paying a check admits the genuineness of the drawer's signature.

Hayes, J.

"Since an acceptor, by section 62, engages to pay the bill 'according to the tenor of his acceptance,' he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since section 87 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, *a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not, indeed, all, of the European states."

Under the rule of these authorities, had plaintiff merely accepted the bill drawn upon it, it could not be heard thereafter to deny that the signature of the drawer was genuine, but it would have been held bound upon its promise to pay the check, and to pay it in accordance with the tenor thereof; so, by paying the check, plaintiff is bound to the same effect, for payment is more than acceptance, in that it discharges the indebtedness represented by the check after it is accepted.

5. Person Negotiating by Delivery.

Lobdell v. Baker. 3 Metc. (Mass.) 469.

Baker owned a note, indorsed in blank by the payee, which he sold without indorsement to a person through whom the plaintiff holds. Before negotiating the instrument, Baker procured the indorsement of Swan, a minor, and is now sued upon his implied warranty that prior parties had capacity to contract.

Held, that a person who negotiates by delivery warrants the capacity of prior parties to contract.*

Shaw, C. J.

The defendant, having the note indorsed in blank, for sale, as appears by his afterwards in fact selling the same, caused a minor, and clerk in his employment to put his name upon it in blank, as indorser. Every man is presumed to intend all the necessary natural and probable consequences of his own acts, conduct and language. The ordinary purpose, for which a person indorses a note not due, is to give it currency. He is held out as one who has been the holder and proprietor of the note, and indorses it for the double purpose of transferring title to another, and giving the conditional undertaking, which an indorsement implies, to pay it if dishonored by the promisor. This is the implied representation of an accommodation indorser, and he cannot show that he did not intend to be bound. His contract is inferred from his act. When therefore a man, for a valuable consideration, puts into circulation a note, bearing the name of a blank indorser, with nothing to rebut the natural inference to be drawn from it, he by necessary implication affirms that the indorser is a person capable of indorsing, and binding himself by such indorsement. Such inference may be repelled by matter accompanying; as if a note were given by a husband payable to his wife or her order, and she should indorse as wife; anybody taking the note would see that the indorsement was made by a *feme covert*, who as attorney could pass the note, but as a *feme covert*, could not bind herself. But, unexplained, such a person is represented to be one capable of being an indorser with the usual consequences.

There is a manifest difference in such case, between a minor, one not bound by a contract, and a person who, though his pecuniary responsibility is not such as adds much strength to the security, does yet bind himself. Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties; but he has a right to believe, without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe, upon the faith of the security itself, that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports. It is an averment to that effect, on the part of him who procures such an indorsement and puts the note bearing it into circulation.

In the present case, the defendant procured such an indorsement of the note, and put it into circulation, unexplained. He thereby affirmed to any one who should take it, that it was so indorsed.

* Note: Under the Negotiable Instruments Act, the contract of a party negotiating by delivery extends only to the immediate transferee.

6. Person Negotiating By Delivery.

Delaware Bank v. Jarvis. 20 N. Y. 226.

J. W. and F. W. Crandall made a note to the order of Peters, who indorsed it for their accommodation. The bank refused to discount the note, and they then sold it to Jarvis, who had it discounted. He did not indorse the note, nor indicate to the bank that he had purchased it for a usurious consideration. The makers were successful in establishing the defense of usury and the bank now sues Jarvis.

Held, that a person who transfers a note by delivery warrants that there is no defense to it arising out of his connection therewith.

Comstock, J.

The authorities state the doctrine, in general terms, that the vendor of a chose in action, in the absence of express stipulations, impliedly warrants its legal soundness and validity. In peculiar circumstances and relations, the law may not impute to him an engagement of this sort. But if there are exceptions, they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case, the defendant held a promissory note which was void because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs and received the cash therefor, by that very act he affirmed, in judgment of law, that the instrument was untainted, so far at least as he had been connected with its origin. I do not now state the rule more broadly, because if I were to do so it might be proper to suggest some of its possible limitations or qualifications. It is enough for the present purpose that, on the sale of the note in question, the defendant became chargeable on an implied undertaking that he held it by a right and title which would enable the purchaser to enforce it against the parties thereto.

In the case before us, I do not entertain any doubt that the defendant impliedly warranted against any legal defense to an action to be brought on the note. His very act of transferring it to the plaintiffs was the strongest possible assertion that no such defense existed.

7. Qualified Indorser.

Challiss v. McCrum. 22 Kas. 157.

Challiss lent money to Ege at a usurious rate, for which he took the note of Ege payable to Probasco or bearer. After maturity, Challiss sold the note to McCrum, but indorsed "without recourse." McCrum attempted to collect from Ege but did not

recover the face value on account of the usury. He now sues Challiss for the deficiency.

Held, that an indorser "without recourse" warrants that the instrument is a genuine instrument.

Brewer, J.

An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer, and is liable on the default of the drawee. "Without recourse," does away with this conditional liability. It leaves the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves him a vendor, and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery. Independent, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: First, that there is an implied warranty of the genuineness of the signatures; and, second, that there is no warranty of the solvency of the parties. But in the case at bar, the signature of the maker was genuine. The objection is, that it was never his legal obligation to the full amount for which it purported to be. How far is there any implied warranty in this respect?

"When the indorsement is 'without recourse,' the indorser specially declines to assume any responsibility as a party to the bill or note but by the very act of transferring it, he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse; but who is nevertheless liable if he draws upon a fictitious party, or one without funds. And, therefore, the holder may recover against the indorser 'without recourse,' (1) if any of the prior signatures were not genuine; or, (2) if the note was invalid between the original parties, because of the want, or illegality of, the consideration; or, (3) if any prior party was incompetent; or, (4) the indorser was without title."

The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as it were no note. This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter. By all authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof.

8. General Indorser.

Curtis v. Davidson. 215 N. Y. 395.

Curtis, the receiver of an insolvent bank, sues Davidson as indorser of notes held by the bank. The defendant asserts his right to set off the amount of his deposit with the bank which he lost at the time that it failed.

Held, that as an indorser is directly liable when the maker fails to pay, he is entitled to set off any claim which he has against the holder.

Seabury, J.

While an indorser is said to be secondarily liable, the holder of a note may sue both the maker and the indorser or either. An indorser sued upon his contract of indorsement is absolutely liable thereon. It is not a defense for him to plead in such an action that the maker is solvent. When sued, the indorser stands for the purpose of that action in the same position as the maker except that he is absolutely liable upon his contract of indorsement while the maker is absolutely liable upon the note. In such an action against him he may set off against his obligation as indorser any debt which the holder of the note may owe to him. In this respect the maker and indorser stand in the same position. The allowance of such a set-off is not a direct preference because where there are mutual demands, the amount of the debt due from one to the other is the difference between these mutual demands. The fact that the indorser may, if the maker is solvent, be indemnified by him in addition to being allowed to set off the amount of his deposit against the insolvent holder, does not preclude the indorser's right of set-off. The possibility of a preference thus resulting to the indorser is speculative and uncertain. In order to defeat the indorser's right of set-off it must appear that he has more than a speculative or uncertain chance of indemnity from the maker. When the indorser seeks equitable relief and proceeds affirmatively against the holder of the note to have the indebtedness of the holder to him set off against his obligation to the holder, it may be that a court of equity would require that he give some satisfactory assurance that he will not be indemnified by the maker. Where the indorser is himself sued he may plead as a set-off the indebtedness of the holder to him and the fact that the holder is insolvent does not deprive the indorser of his right of self-defense. In the presence of mutual demands existing between the holder of the note and the indorser, the debt due is the balance that remains after one has been set off against the other. The party claiming that the debt due is more than the balance, which is the *prima facie* amount of the debt, has resting upon him the burden of proving the fact upon which his claim rests. In the case under consideration, upon the pleadings as they stand, the defendant was entitled to set off the amount due him from the bank.

9. Order of Liability of Indorsers.

Wilson v. Hendee. 74 N. J. L. 640.

W. D. Wilson made a note payable to the order of the Vine-land Bank, which prior to delivery was indorsed by C. W. Wilson,

the plaintiff, and by Hendee, the defendant, both of whom indorsed for the accommodation of W. D. Wilson. C. W. Wilson paid the note at maturity after protest, and now sues Hendee upon an agreement made with him that Hendee should pay the note at maturity. Hendee insists that such an agreement cannot be proved by oral testimony.

Held, that oral evidence may show any agreement made between indorsers as to the order of their liability.

Pitney, J.

It is obvious that the [negotiable instruments] act was intended to do away with some of the distinctions established or recognized by our adjudicated cases respecting the form and mode in which a contract of indorsement might be entered into, and the effect of making such an indorsement, whether as between the parties or with respect to subsequent holders of negotiable paper. By section 63 of that act, "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Section 64 is as follows: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

It will be observed that this section deals with the rights of the payee and subsequent parties, and has not the effect of defining the rights and liabilities of several irregular indorsers as between themselves. These are set forth in section 68, which reads as follows:

"As respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise," &c.

This does not, by express mention, sanction parol evidence. Neither does it expressly exclude any kind of evidence, whether written or verbal. Is parol evidence excluded by implication? If the legislative design was to admit only written evidence for the purpose indicated, it would have been unnecessary to say anything upon the subject, for by the common law rules of evidence, other writings explanatory of the real agreement would, of course, have been admissible. When we recall that a previous section had brought irregular and regular indorsers into a single category in the absence of an expressed intention to the contrary; that the first clause of section 68 renders the mere act of indorsement only *prima facie* evidence of

the contract as between successive indorsers, and that by previous decisions parol evidence as between irregular indorsers was for all purposes admissible, and as between regular indorsers was for some purposes admissible and for other purposes not, it is easy to arrive at the conclusion that the section was intended to admit parol evidence in all cases between indorsers for the purpose of showing what was the agreement amongst themselves. This view brings our state into accord with the rule already laid down in some other jurisdictions as the common law rule. At the same time it does not destroy the value of the instrument as a commercial instrument, for it is not against those who subsequently take the instrument in the course of commerce that the explanatory evidence is admitted. When we remember that the rules of the law merchant in this regard were established especially for the protection of subsequent holders of the instrument, and that the liability of indorser arises not from any words expressed upon the paper, but from implications that originated in the necessities of trade and commerce, it is reasonable to attribute to the legislature an intent to leave the paper open to explanation by parol as between the indorsers themselves.

In our opinion, therefore, the act admits of the introduction of parol evidence to show the actual agreement made between several indorsers, notwithstanding it contradicts the *prima facie* inference appearing from their successive indorsements.

III.

PRESENTMENT FOR PAYMENT AND NOTICE OF DISHONOR.

Presentment for payment is not necessary in order to charge the person primarily liable, but it is necessary in order to charge drawer and indorser.

When the instrument is not payable on demand, presentment must be made on the day it falls due. When it is payable on demand, presentment must be within a reasonable time after its issue, except in the case of a bill of exchange, which must be presented within a reasonable time after its last negotiation.

When the day an instrument falls due is a Sunday or legal holiday, the presentment may be made on the next business day by the rule in most states, unless specially required on the Sunday or holiday. Some states, however, hold that the presentment must be made on the preceding day. Formerly three days of grace were allowed to persons primarily liable on negotiable instruments in which to pay them before the holder could proceed against per-

sons secondarily liable. At the present time most of the states have eliminated or greatly restricted these days of grace. Three days of grace are generally allowed in the case of sight drafts but not on other instruments.

Presentment must be made by the holder or some person authorized to receive payment in his behalf at the proper place; at a reasonable hour; to the person primarily liable, or if he is absent, to a person at the place where presentment is made.

Presentment for payment is made at the proper place:

1. When a place is specified and the instrument is there presented.
2. When no place is specified but the address is given and the instrument is there presented.
3. When no place is specified and no address given, and presentment is made at the usual place of business or residence of the person who is to make the payment.
4. In any other case, if presented to the person or at his last known place of business or residence.

The instrument must be exhibited to the person from whom payment is demanded, and must be delivered on payment. When the instrument is payable at a bank, presentment must be made during banking hours unless there are no funds to meet it. In that event, presentment at any time before the bank is closed on that day is sufficient.

When the person primarily liable is dead, presentment must be made to his personal representative.

When several persons are each primarily liable on the instrument, whether as partners or otherwise, presentment to any of the parties is sufficient if no place for presentment is specified. However, presentment must be made to all persons jointly liable.

Failure to make presentment is excused:

1. When the instrument is made for the accommodation of the indorser.
2. When, after the use of reasonable diligence, presentment cannot be made.
3. By waiver of presentment expressed or implied.

Delay is excused when caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of the delay ceases presentment must be made with reasonable diligence.

When the instrument has been dishonored, notice of dishonor must be given to persons secondarily liable, or they will be discharged. This notice may be given either personally or by agent.

When notice is given to one party by another party, all subsequent holders may take advantage of it, as may prior parties who have rights against the party to whom it is given.

The following rules for giving notice are important:

1. When the parties reside in the same place, notice must be given:
 - a. If at the place of business, before the close of business hours on the day following dishonor.
 - b. If at the residence, before the usual hours of rest on the day following dishonor.
 - c. If sent by mail, it must be deposited in the post office in time to reach its destination in the usual course on the day following dishonor.
2. When the parties reside in different places, notice must be given:
 - a. If by mail, in time to go by mail the day following the day of dishonor, or if no mail goes that day, by the next mail thereafter.
 - b. If given otherwise, then within the time notice would have been received if it had been deposited in the post office at the proper time.
3. When a party receives notice, he has the same time for giving notice to antecedent parties that the holder has to give notice after dishonor. Parties are not responsible for delay or miscarriage of the mail.
4. When a party has given no address in the instrument, notice must be sent either to the post office nearest his place of business; or to the post office where he is accustomed to receive his mail; or to the place where he has sojourned.

Actual receipt of notice is always sufficient.

Notice of dishonor may be waived either before or after the time of giving notice. If the waiver is in the body of the instrument, it is binding on all parties, but if it is written above the signature of an indorser, it binds him only.

Delay in giving notice of dishonor is excused under practically the same circumstances as those under which presentment for payment is excused.

When an instrument is not paid at maturity, it may be "protested" by a notary public, who solemnly protests against the non-payment of the instrument and sends notice to the parties to be charged. At the present time, protest is rarely necessary. In most states, it need not be made except in the case of foreign bills of exchange.

A. Presentment.

1. Rules Under Negotiable Instruments Law.

Revised Laws of Massachusetts. Chapter 73.

Section 89. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

Section 90. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Section 91. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Section 92. Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Section 93. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if there is any such, and if, with the exercise of reasonable diligence, he can be found.

Section 99. Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment cannot be made;

2. Where the drawee is a fictitious person ;
3. By waiver of presentment, express or implied.

2. Presentment Not Necessary to Charge Maker.

Farmers National Bank of Annapolis v. Venner. 192 Mass. 531.

The Bank, as holder, sues the defendants as makers of a demand note, dated at New York City and payable at the office of Wilson, Colston & Company, Baltimore. The defendants defend partly on the ground that no demand was made upon them for payment at the place specified.

Held, that presentment at the place specified is not necessary in order to charge the maker of a negotiable instrument.

Morton, J.

The defendant Venner contends in the first place that no action can be maintained on the note because no demand was made for its payment at the office of Wilson, Colston & Company in Baltimore. It is settled in this state, both at common law and recently by statute, and by the weight of authority in this country, contrary to the law in England, that, where a note or bill of exchange is payable at a particular time and place, no demand or presentment at the place named is necessary in order to entitle the holder to maintain an action upon the note or bill against the maker or acceptor. We see no valid distinction between a note payable on time at a particular place and a note payable on demand at a particular place. No demand is necessary before suit, where a note is payable generally on demand, and as we have seen no demand is necessary when a note is payable on time at a particular place. It seems to us that the fact that both circumstances are found in the same note cannot operate to change the rule and render a demand necessary when it would not otherwise be required.

3. Presentment to Hold Drawer of Check.

Gordon v. Levine. 194 Mass. 418.

Levine drew a check to the order of Gordon, which he requested Gordon not to deposit until two days afterwards. It was negotiated to two other parties, the last of whom deposited it for collection six days after it was drawn. In the meantime, the bank had failed. Levine defends on the ground that the check would have been paid if it had been presented within a reasonable time.

Held, that a check must be presented within a reasonable time after it is issued or the drawer will be discharged to the extent of the loss occasioned by the delay.

Morton, J.

The general rule is as was stated by the judge and as is provided in the negotiable instruments act that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented, and the drawer sustains a loss by reason of the failure of the drawee, he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument which though defined in the negotiable instruments act as "a bill of exchange drawn on a bank payable on demand" is intended for immediate use, and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss, if any, resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The negotiable instruments act provides generally, as the judge said, that "In determining what is 'a reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case." This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is, that where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss, it falls not on him but on the holder.

4. Presentment to Hold Indorser of Note.

Pierce v. Cate. 12 Cush. (Mass.) 190.

Brown made a three months' note payable to Cate, who indorsed it to the plaintiffs. Before maturity, Brown absconded. On the last day of grace the plaintiffs notified Cate by mail that the note had not been paid; but no demand on, or inquiry for, the maker was proved.

Held, that presentment must be made to the party primarily liable in order to hold an indorser.

Shaw, C. J.

We are aware that in some of the earlier cases in Massachu-

setts, it was held that proof that the maker had absconded, or failed, and become insolvent, so that a demand would be unavailing, would be an excuse for want of presentment. But it has been decided, on consideration, and upon principle, that the obligation of an indorser is conditional; that is, that he will be answerable, if at the maturity of the note, the holder will present it to the maker for payment; and if thereupon the maker shall neglect or refuse to pay it, and the holder will give seasonable notice to the indorser, he will pay it himself. These are the conditions of his liability. The holder, therefore, to charge the indorser, must show a compliance with these conditions, or that proper means have been taken to effect a compliance with them, unless, indeed, he can prove a waiver of them by the indorser. And this, we think, is the rule as now settled. If the maker has left the state, the holder must demand payment at his actual or last place of abode, or of business, within the state.

5. Presentment to Hold Indorser of Check.

Swift & Company v. Miller. 62 Ind. App. 312.

Miller sues Swift & Company to recover on a check drawn by Elson, an agent of the Company, and indorsed by him in the name of Swift & Company to Miller. The bank refused to honor the check on presentment seven days after it was drawn. The Company contends that as an indorser it is released from payment on account of delay in presentment.

Held, that delay in presentment releases the indorser of a check.

Felt, J.

The statute provides that an instrument payable on demand must be presented within a reasonable time after its issue. Under the rules of the law merchant, a check must be presented within a reasonable time after it is received. Under ordinary conditions, when the holder resides at the place the check is made payable, such reasonable time for presentment includes all of the banking hours of the day immediately following the day on which the check is received. If the bank upon which the check is drawn is at another place the check must be forwarded to the place of payment on the next business day, and be presented not later than the day immediately following the day of its receipt at the place of payment. As between the holder of a check and an indorser, unreasonable delay in presentment for payment, or in giving notice of dishonor, will discharge the indorser from his liability without regard to whether such delay did or did not occasion loss to the holder.

"An indorser of a check is not liable where presentment is not

made in a reasonable time. Where the payee of a check becomes chargeable as an indorser only, such check must be presented for payment within a reasonable time. In order to charge an indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes into his possession. Where such reasonable time is not fixed by statute, then, in the absence of special circumstances of excuse, it is limited to the next business day, or if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment. The distinguishing feature of the liability of an indorser of any negotiable paper is that such liability is contingent upon due presentment for payment and notice of dishonor. The rule is based upon the implied undertaking of the indorsee that he will use due diligence in the prosecution of his demand against the maker; that he will present the paper for payment immediately upon its maturity, and will not, by his negligence, expose the indorser to a hazard of loss, against which he, in case of notice of dishonor, might be able otherwise to protect himself. Without such notice the indorser would have a right to conclude either that the note was paid or that the holder was satisfied to look alone to the maker for payment. Nor are the rights of the indorser changed because he suffered no apparent damage by reason of failure to demand payment and give notice of dishonor to him within the required time. If the holder failed to perform this duty to give timely notice of nonpayment, the law presumes injury to the indorser, and discharges him. Neither justice nor convenience will admit of an inquiry, whether actual damage was sustained. It was formerly held that it was incumbent on the person insisting on the want of notice, or other omission, to prove that he had really sustained damage by laches of the holder; but it has been settled by later decisions that such damage is to be presumed." The New York Court of Appeals, in considering the liability of an indorser of a check, said: "The plaintiff on accepting the check assumed, as between himself and the defendant, an obligation to present the same to the bank for payment within the time prescribed by the law merchant, that is to say, not later than the next day after its date, and if refused, to protest the same and give notice of non-payment. It was not presented until the thirty first of August, nine days after it was received by the plaintiff. The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law merchant, was a condition upon performance of which the liability of the defendant as indorser depended, and this delay was not excused although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment. A different rule obtains as between the holder and drawer of a check. As between them presentment may be made at any time and delay

in presentment does not discharge the liability of the drawer unless loss has resulted."

"The undertaking of the indorser of a check is that, if not paid on presentation within a reasonable time, he will pay it, provided he is properly notified. Such reasonable time for presentation and demand for payment is admitted to be within the day following the indorsement. The indorsee, as between himself and the indorser, undertakes to demand payment within the day following the indorsement, and, if payment is not made, to give due notice of dishonor. This is his sole duty, and he does anything else at his peril. The fact that there are no funds in the account against which the check is drawn does not relieve the holder from presentation and notice of dishonor to the indorser, unless it appears that the indorser knew it. Nor are the rights of the indorser changed because he suffered no apparent damage by reason of failure to demand payment and give notice of dishonor to him within the required time."

6. Presentment to Hold Indorser of Draft.

Columbian Banking Company v. Bowen. 134 Wis. 218.

June 10, 1903, the Farmers' and Merchants' Bank sold Bowen a draft payable to his order, drawn on a Chicago Bank. Bowen indorsed the draft to Tabbert on June 16, 1903, and Tabbert received it June 20, 1903. July 14, Tabbert indorsed the draft and sold it to the plaintiff, who presented it at once for payment, which was refused. The plaintiff now sues Bowen as indorser. Bowen contends that he is released by the delay in presentment.

Held, that a bill of exchange may be presented within a reasonable time after its last negotiation.

Marshall, J.

Sec. 1678-1 provides, as to a bill of exchange payable on demand, which obviously includes a draft on a bank of the character of the one in question, "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved, may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That

difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed.

As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18th of one year and January 16th of the next year was not necessarily unreasonable. Perhaps one might now keep a bill of exchange for such length of time as to destroy its circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

7. Presentment Not Necessary to Charge Accommodated Party.

Bergen v. Trimble. 130 Md. 559.

Cowan made a note to the order of Trimble & Brothers, for their accommodation. Trimble & Brothers indorsed the note to the plaintiff, who sues them upon it without presentment at maturity and without notice of dishonor.

Held, that demand and notice is not necessary to charge a party for whose accommodation the instrument is made.

Pattison, J.

"Section 99. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented."

"Section 134. Notice of dishonor is not required to be given to the indorser . . . where the instrument was made or accepted for his accommodation."

If the money was loaned to the defendants for their sole benefit, the note, though signed by Cowan as maker, was made for their accommodation and no demand of payment of the note at maturity was necessary, and no notice of its dishonor was required to be given the defendants as indorsers.

If the loan was made to Cowan and the defendants for their joint benefit and the payment of that loan was to be secured by a note, executed by agreement between them in the manner and form shown by the record, there was an obligation on the part of both the defendants and Cowan to pay the note at maturity.

The fact that the loan was not made for the sole benefit of the defendants does not change the character of the indorsement in respect to demand for payment or notice of dishonor. They were nevertheless, in our opinion, accommodated indorsers within the meaning of the statute; and the plaintiff was not required to make

demand upon Cowan or give notice to the defendants of the non-payment of the note.

The evidence offered we think was legally sufficient to go to the jury as tending to show that the note was made for the accommodation of the indorsers within the meaning of the statute, and that their indorsement thereon was that of accommodated indorsers, who had no reason to expect the note would be paid by the maker if presented for payment.

8. To Whom Presentment Should Be Made.

Gower v. Moore. 25 Me. 16.

Witherspoon gave a note to Moore, who indorsed and negotiated it. After it had passed through various hands, Freeman, then the holder, notified Moore, after the death of Witherspoon and before the note became payable, that he should look to him for payment. About a month after the date of maturity, the plaintiff, then the holder, also notified Moore that the note was unpaid and that he should look to him for payment.

Held, that a note must be presented to the personal representative of a deceased maker.

Shepley, J.

This is a suit by the indorsee against an indorser of a promissory note, made on August 12, 1841, and payable in two years. Before it became payable the maker had deceased, an administrator had been appointed, the estate had been represented to be insolvent, commissioners of insolvency had been appointed and the holder of the note had proved it before them. When the maker of a note dies before it becomes payable, the holder should make inquiry for his personal representative, if there be one, and present the note on its maturity to him for payment.

In this case the indorser may be considered as knowing that the note would not be paid on presentment; and that the estate was insolvent. But such knowledge does not relieve the holder from his obligation to make presentment and give due notice of its dishonor. The promise of the indorser is a conditional one to pay, if the note be duly presented to the maker, and seasonable notice be given to him of its dishonor.

The holder cannot assume the right to decide that his performance of the condition will be of no service to the indorser, and thus put that matter in issue to relieve himself from the performance of the condition imposed upon him by law.

The various relations which the parties whose names are upon negotiable paper sustain towards other persons whose names are not upon it, cannot be anticipated.

The real debtors, who may feel obliged to pay, may not wish to

exhibit themselves as such. A deceased party may possibly have held a contract of some responsible person to pay in case the note should be duly presented for payment. So may an indorser. To hold an indorser liable and yet deprive him of the benefit of such a contract could not be justified. It is best for a commercial community that the rules be simple, subject to few exceptions, and not liable to be varied to meet the apparent injustice of particular cases. The notices given to the defendant in this case were either too early or too late to be of any avail.

9. To Whom Presentment Should Be Made.

Gates v. Beecher. 60 N. Y. 518.

Bassett, Beecher & Company made a note which was indorsed by the defendant, Beecher. At maturity, after the makers had become insolvent, it was presented at the last place of business of the firm and to Bassett personally. Notice was sent on the same day to Beecher, who defends this suit against him as indorser on the ground that presentment should have been made to all the partners.

Held, that presentment may be to any member of a firm, even after the firm has been dissolved.

Folger, J.

There is a distinction taken between the case of a note of joint makers who are not partners, and a note of partners who are still partners at the maturity of the note. That distinction rests upon the fact that partners are but one person, in legal contemplation; that each partner, acting in such capacity, is not only capable of performing what all can do, and of receiving and paying out that which belongs to all, but by such acts necessarily binds them all; that, as incident to such joint relations, all of the partners are affected by the knowledge of one. These things do not pertain to the relation of joint makers who are not partners. Hence, while a demand of one partner is equivalent to a demand of all, a demand of one of joint makers not partners is not. And so a demand upon one partner is sufficient, because he represents the firm, and a dishonor by one is a dishonor by all, and each is presumed to have authority to act for the others; while in the case of a note of joint makers not partners, the indorser has a right to rely upon the responsibility of all and each, and may insist upon a dishonor by each. So that the inquiry seems to be, whether a dissolution of a partnership, effected by the bankruptcy thereof, has so far changed the relations of the members of it as that the act or knowledge of one does not affect all the rest.

The contract of the indorser of the promissory note of a co-partnership is that he will pay if the co-partnership does not, while

that of the indorser of the note of joint makers is that he will pay if neither of them does. One joint maker, not a partner of the other, may not be able to speak for the other as to his ability or disposition to protect his promise and to save his indorser from liability, while one partner, though the firm has been dissolved, is supposed to know and care as much as the other of its ability and willingness in those respects. Again, the purpose of demand and notice to the indorser is that he, being made knowing of the failure to pay by the co-partnership, may be put at once on his guard, to save himself, if may be, from loss. This end is achieved when one of former partners has refused to pay, as when all have.

10. Place of Presentment.

Cox. v. National Bank of New York. 100 U. S. 704.

Cox drew a draft to the order of Whitlock on Cox & Cowan, addressed to them in New York, which was duly accepted. Whitlock indorsed the draft to Wright & Company, who indorsed it to the plaintiff, the Bank of New York. Cox and the indorsers defend a suit by the bank on the ground that the draft was not properly presented, although the notary who protested it for non-payment made diligent search for the acceptor in New York City. The bank knew that Cox & Cowan's usual place of business was at Hopkinsville, Kentucky.

Held, that a bill of exchange is properly presented at the place designated by the address as the place where the acceptance took place.

Clifford, J.

Where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circumstances fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business. Circumstances, however, may control the usual inference arising from the want of any such expression in the instrument which may warrant a very different conclusion. Thus, if a bill were drawn upon a merchant when abroad, and should be addressed to him at Paris or at London, the place of payment would be the place where the drawee accepted the instrument, whether Paris or London, and not the place of his residence when the bill was drawn or at its maturity.

Provided no place is designated or agreed or indicated in the form of the address or the terms of the acceptance, the rule then is that the presentment for payment must be made at the home or domicile of the acceptor or maker, or at their usual place of business during business hours.

Acceptors of a bill of exchange stand in the same relation to the [payee] of the bill as the maker of a note does to the payee, the acceptor being the principal debtor in a bill precisely as the maker is of a promissory note, the rule being that the liability of the acceptor is governed by the terms of his acceptance, just as the liability of the maker of a note is defined and governed by the terms of a note; nor can the place of payment be of any more importance in the one case than in the other.

When a note or bill is made payable at a particular bank, as is frequently the case, it is well known that, according to the usual course of business, the note or bill is usually lodged in the bank for collection; and if the maker or acceptor calls to take it up when it falls due, and it is delivered to him, and he pays the amount, the business is closed; but if he does not find the note or bill at the bank, he can deposit the money to meet the same when it shall be presented, and the proof of such tender and deposit, in case of a subsequent suit, will exonerate him from all costs and damages. Or should the note or bill be made payable at some other place than a bank, and no deposit should be made, or he should choose to retain the money in his own possession, an offer to pay at the time and place would protect him against interest and costs on bringing the money into court.

Beyond doubt, these principles are applicable, as determined by this court, where the suit is against the maker of the note or the acceptor of the bill; but when recourse is had to the indorser of the note or the drawer of the bill, very different considerations arise, as they are not the principal debtors to the holder of the instrument. Their undertaking is not absolute, like that of the maker of the note or the acceptor of the bill, but conditional, that if the maker in the one case or the acceptor in the other refuses to make good the undertaking they will pay the amount. Hence, the holder is bound to use due diligence to obtain payment from the maker or acceptor, as a condition precedent to his right to recover of the parties only conditionally liable. Consequently, when a place of payment is designated in the body of the note or bill, the drawer or indorser has a right to presume that the maker or acceptor has provided funds at such place to pay the note or bill, and to require the holder to apply for payment at such place, unless when the place designated is a bank, and the bank is the holder of the instrument, when the rule does not apply. In all other cases the obligation is absolute, that the holder must aver and prove a presentment at the designated place, unless the necessity is obviated by agreement, or something appears in the instrument to indicate a different intention.

Enough has already been remarked to show that when a bill or note is expressed to be payable at a particular place on demand, it is always sufficient to prove that it was presented there to charge the acceptor or the indorser. Where a bill is drawn on a firm, as

W. M. & Co., at a particular number and street, as at 263 Washington Street, New York, the presentment should be made at their place of business, as presumable from such address, or at the residence of either of the firm.

If the instrument is payable in a particular town, and the residence of the maker or acceptor is elsewhere, the holder is not bound to make demand anywhere except in that town.

If the bill is drawn upon the drawee domiciled in one place and is payable in another place, and is accepted by him, meaning without qualification, the presentment should be made at the latter place. Thus, if a bill is drawn on the drawees at Liverpool, payable in London, and is accepted, without explanation, the presentment for payment must be in London, if any particular place is there pointed out where demand may be made, and if none, and no one can be found to pay the bill, it may be protested there for non-payment for that very cause.

So where a bill is directed to the drawee at a particular house, and is by him accepted without condition, the going to that house with the bill on the day of payment and finding it closed is a sufficient presentment.

11. Place of Presentment.

Chicopee Bank v. Philadelphia Bank. 8 Wall. (U. S.) 641.

Coglin drew a bill of exchange to the order of Rhodes. The bill was accepted by the drawee, payable at the Chicopee Bank. Rhodes indorsed it to the Philadelphia Bank, which sent it to the Chicopee Bank for collection. The draft was mislaid by the Chicopee Bank and was not presented for payment at the proper time, which resulted in the discharge of the drawer and indorser. The Philadelphia Bank sues the Chicopee Bank for its negligence.

Held, that actual presentment must be made in order to charge the indorsers of negotiable paper.

Nelson, J.

In cases where the drawee accepts the bill, generally, in order to charge the drawer or indorser, the holder must present the paper, when due, at his place of business, if he has one, if not, at his dwelling or residence, and demand payment; and, if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place, and payment demanded. In these instances, as a general rule, the bill must be presented when the demand is made, as in case of payment the acceptor is entitled to it as his voucher. When the bill is made payable at a bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to payment.

of the paper, constitute a sufficient presentment and demand; and, if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is that the paper was in the bank, and the burden rests upon the defendant to show the acceptor called to pay it.

In the present case, it is argued that the bill was in the Chicopee Bank at the time of its maturity, and, as the acceptors had no funds there, a sufficient presentment and demand were made, according to the law merchant. It is true the bill was there physically, but, within the sense of this law, it was no more present at the bank than if it had been lost in the street by the messenger on his way from the post office to the bank, and had remained there at maturity; and this loss, which occasioned the failure to take the proper steps, or, rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant. The radical vice in the defense being the failure to prove a presentment and demand upon the acceptors at the maturity of the bill, the question of notice is unimportant.

12. Place, Time and Manner of Presentment.

King v. Crowell. 61 Me. 244.

Morton made a note payable to the order of Crowell, who indorsed it to Glidden. The note was subsequently negotiated to King, who upon non-payment sues Crowell as indorser. King demanded payment of Morton on the street at 10 o'clock on the day of maturity and at 12 o'clock notified Crowell of non-payment.

Held, that presentment was properly made.

Virgin, J.

The defendant declines to pay the note on the following alleged grounds:

1. That the demand was not lawful, inasmuch as it was made on the street.

The general rule of law is that the holder must use diligence to find the maker and demand payment of him; and the inquiry will be, whether, under the circumstances of the case, due diligence has been used.

It is familiar law that when a promissory note payable generally, and not at a specified place, is seasonably demanded at the maker's known and settled place of business for the transaction of his moneyed

concerns, it is sufficient to hold the indorser. And the same may be said of a like demand made at his place of residence. Neither does it make any difference whether the maker be personally present or temporarily absent at the time of the demand. In either case, the law has for many years been constant in declaring that the evidence afforded by such a demand constitutes full proof of due diligence on the part of the holder.

But in the case at bar the plaintiff went still further than the technical exactions of the law required. He was a resident of Monmouth. On the day the note became due he went to Winthrop village, where both the maker and the defendant resided, "for the purpose of collecting this note, or of taking the necessary steps to hold the indorser." On going to the store which had been occupied by the maker as his place of business, he found it had been closed and in the possession of an officer more than thirty days; that the maker had failed in his business, and that all his property was under attachment. Thereupon the plaintiff went to the maker's place of residence, where he was informed that the maker was not at the house, but had gone out on the street. Had he gone through the ceremony of demanding payment of the note at the house, while the maker was out on the street, the law would pronounce the plaintiff's diligence ample. But not finding the maker at home, the plaintiff trebled his diligence, sought and found him on the street in that country village, and then and there requested payment of the note of the maker personally, which was refused.

It does not appear (as it would be likely to, if true) that any objection to the place of demand was made by maker. If he had had funds with which to pay, not with him, but at his house, he would at once have said so. If he had objected to the place and requested the plaintiff to accompany him to his house and receive the money due on the note, and the plaintiff had declined so reasonable a request, the legal aspect of this branch of the case might thereby have been materially changed. But no such facts exist. He simply refused payment, and, in all human probability, for the real, though to him, perhaps, unpleasant, reason that all his property was in the custody of the law, and he had in fact nothing wherewith he could pay.

It would seem that such a demand would be more satisfactory to all concerned than a mere formal ceremony of a demand gone through at his place of residence during the maker's absence. And we have no hesitation in declaring the demand sufficient under the circumstances, so far as the place is concerned, to charge the defendant.

We are aware that Byles on Bills declares that a demand made on the street is not sufficient. And there are several cases containing the *dictum* in general terms that a demand must be made either at the maker's place of business or place of residence. But our attention has been called to no case, neither have we, after considerable research, been able to find any wherein the court having the question

before it decided adversely to a demand made on the street, under circumstances similar to those in this case.

On the other hand, Judge Story, in discussing the law applicable to notes like this, uses the following language: "The general rule is, that the presentment for payment may be made to the maker personally, or at his dwelling house or other place of abode, or at his counting-house or place of business. It seems a presentment may always be made personally to the maker, wherever he may be found, although he may not be either at his domicile, or at his place of business."

2. But the defendant, further objecting to the sufficiency of the demand, says: "As the payer has a right to require its delivery up to him before he pays, and may insist that the holder produce it, the note should have been exhibited."

It is true that the rule requiring the person making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and, although applicable to all written contracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay cannot apply to cases in which he not only does not offer, but absolutely refuses, to pay, and does not even express any desire to see the note.

The idle ceremony of producing the note when the maker unqualifiedly refuses to pay is well illustrated by C. J. Shaw: "Even under the law of tender, which is extremely strict, it is held that where a party to whom a tender is to be made declares that he will not accept it, an actual production and offer of the money is not necessary."

The case finds expressly that the maker had the note in his possession when he made the demand. We think the objection cannot prevail.

3. The defendant finally contends that the notice having been given to the defendant on the last day of grace was premature, for the reason that the maker had the whole day in which to pay.

We presume, however, that the defendant predicated this objection upon the alleged insufficiency of the demand. The rule applicable to notes like the one in question [is] that the note is due on actual demand at any such hour on the last day of grace that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in condition to attend to ordinary business; and if upon such demand payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no such demand be made, and the maker does nothing amounting to a waiver, he has the whole of the day in which to make payment, and is not in default until the expiration of the business day within which such demand might have been made.

13. Manner of Presentment.

Gilpin v. Savage. 201 N. Y. 167.

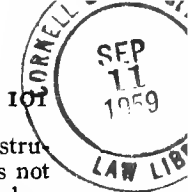
Savage was the indorser of a note payable at a particular place designated by street and number, which was held at maturity by the Columbia National Bank. The cashier of the bank at that time called up the maker at his place of residence and requested payment over the telephone. Payment was refused. In a suit against Savage as indorser, he defends on the ground that this was not a proper presentment.

Held, that a demand over the telephone is not sufficient presentment of the note.

Cullen, C. J.

It seems entirely clear that no proper presentment of the note was made. Presentment of a note and demand of payment must be made by actual exhibition of the instrument itself, or at the least the demand should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case. While it may not be necessary to actually produce the note if the maker refuses to pay it, it must be there at the place for presentment, otherwise the presentment is insufficient. "A demand of payment, at the place named, is an essential part of the contract so far as the indorser is concerned, and no right of action accrues to the holder until 'after demand has been made in strict compliance with the terms of the contract and due notice given of the default.' It is essential to the validity of a demand that it shall be made by a person authorized to receive payment and deliver the instrument upon which it is founded, and the person upon whom it is made must then be afforded an opportunity, by immediate payment or performance, to protect himself from the consequences of a breach of contract." So necessary is it that the demand be made at the place specified in the instrument in order that the indorser may be charged, that the addition to a promissory note payable generally of words specifying a particular place of payment is held to be a material alteration of a contract which of itself discharges the indorser.

The counsel for the respondent seeks to sustain the judgment below on two propositions: First, that a demand over the telephone on the maker, at the place specified in the note, is the same as a demand at that place by ordinary speech; second, that the possession of the note by the cashier was sufficient to make the demand a proper one. The truth of the first proposition as a general rule may be conceded; but the argument ignores the fact that a valid presentment, as hitherto pointed out, consists of something more than a mere demand. It requires personal attendance at the place of demand with the note, in readiness to exhibit it if required and to receive payment and surrender it if the debtor is willing to pay. The counsel



cites several cases in which it is said that the possession of the instrument by the person making the demand is sufficient although it is not actually exhibited. These statements were entirely accurate when made before the general use of the telephone. When demand is made by ordinary human vocal power, unaided by mechanical device, it is plain that the person making the demand is necessarily present at the place at which the demand is made, and if the instrument is in his possession the presence of the instrument is equally clear. The statement if now inaccurate is so by the use of the telephone. If the theory on which the decisions of the courts below have proceeded is to prevail, it is difficult to see why a valid presentment of a note payable in Buffalo might not be made over the telephone from New York, or if that is to be deemed too great a distance, where shall the line between a sufficient and insufficient demand and presentment be drawn? Will a demand for payment of an instrument payable in Buffalo be good if made at Batavia and bad if made at Rochester?

14. Time of Presentment.

The Salt Springs National Bank v. Burton. 58 N. Y. 430.

Phelan made a note payable at the First National Bank of Waterloo, which was indorsed by Burton. On the day the note became due, Burton was ready to pay it and sent Phelan, the maker, to the bank to find out how much was due. The note was not in the bank at the time, and did not arrive there until it was brought in by the cashier of the plaintiff bank at 5 o'clock. It was then protested, and the bank seeks to hold Burton as indorser.

Held, that when a note is payable at a bank, it may be presented before the close of the bank on the day of maturity, unless the maker is prepared to pay.

Rapallo, J.

When a note is made payable at a bank, the general rule is that in order to charge the indorser the note should be presented for payment at the bank during its customary business hours, for if the holder goes to the bank after those hours and finds it closed or no one there authorized to answer to the demand, he can make no valid demand, and the indorser will be discharged. In other cases the holder has the whole day to present the bill or note, the only limitation being that he must present it at a reasonable hour, and this may depend upon the circumstances of the case. But even in the case of paper payable at bank, if after business hours the holder obtains admittance and finds in the bank a person authorized to answer, a demand of such person and refusal for want of funds will in general be sufficient.

In the present case the customary business hours of the bank at which the note was payable ended at four o'clock P. M. The note was not brought there for presentation until five P. M., but the holder was then admitted into the bank and there found the cashier, of whom he demanded payment, which was refused on the ground that no funds had been left with the bank to pay the same. The only question raised in the case is as to the sufficiency of that demand under the special circumstances.

Had the maker gone to the bank prepared to pay the note, and waited there for that purpose until the close of business hours and then left, or had he placed funds in the bank and allowed them to remain there until the close of business hours, and then withdrawn them in consequence of the non-presentation of the note, we are of opinion that a subsequent presentation for payment would not have been sufficient to charge the indorser. "If a party choose to take an acceptance, payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly, and, if by going there out of due time the bill be not paid, it is his own fault, and he cannot proceed as upon a dishonor of it. It is fishing for the dishonor of a bill made payable at a banker's, to present it there for payment at a time when it is known, in the usual course of business, that it cannot be paid."

But in the case at bar, the finding is not that the maker was ready to pay, but that the defendant, the indorser, was endeavoring to pay the note. If he was provided with funds for that purpose he must have retained them. He knew that the note was not paid, and did not expect the maker to pay it, but had himself undertaken to do so. The defendant cannot have sustained any injury, unless it be the expenses of protest, which are trifling, and about which no point seems to have been made at the trial.

15. Time of Presentment.

Capital National Bank v. American Exchange National Bank.
51 Neb. 707.

The American Exchange National Bank held a note payable Feb. 2, 1893, indorsed by the Capital National Bank, against which suit is brought. As this was prior to the enactment of the Negotiable Instruments Act, the maker was entitled to three days of grace. Payment was demanded and notice of dishonor given Feb. 4, as Feb. 5th was Sunday. The indorser claims that demand should have been delayed until the following Monday.

Held, that when the last day of grace falls upon Sunday or a holiday, the instrument must be presented upon the last business day prior thereto.

Post, C. J.

When, uninfluenced by statute, a bill or note without grace, or any non-negotiable instrument, falls due on Sunday or a legal holiday, it is payable on the business day next following, since the maker is not required to pay before the maturity of the debt. But with days of grace, which the law regards as an indulgence, the rule is different, and when grace on a note or bill expires on Sunday or other non-business day, such instrument is due and should be presented for payment or acceptance the day preceding. Thus, if grace expired on Sunday it would fall due on Saturday, and if a holiday (such as Christmas Day) fell on Saturday before the Sunday of its maturity, it would fall due on Friday preceding. The latest business day within or before the period of grace is the day of payment, even though all grace be excluded.

16. Excuse for Failure to Make Presentment.

Wilson v. Senier. 14 Wis. 380.

McDonald made a note to the order of Senier, who indorsed it to Wilson at about the time that it became due. McDonald was then insolvent. Wilson was suddenly taken ill and presentment was not made until after Senier had left for England. No notice was sent to him until his return the following year, when it was given by Wilson's executrix.

Held, that delay in making presentment is excused only by circumstances beyond the control of the holder.

Dixon, C. J.

The note on which this action was instituted was payable on a day certain. As to such it is well settled that they must be presented for payment on the very day they fall due, and that a delay of even one day after the instrument has come to maturity, discharges the parties not primarily liable; unless the delay or omission to present be excused by some accident or other circumstance, not attributable to the fault of the holder, which renders it impossible or unsafe for him to do so; or unless presentment and notice have been waived in some of the ways recognized by law. In respect to such paper, the time within which a demand shall be made and notice given has, by repeated adjudications, been very accurately defined. It is confined within very narrow limits—so narrow, indeed, as hardly to be open to the question of reasonable diligence. Hence the question here presented differs widely from that involved in cases of bills payable after sight, or notes on demand, when the action is brought to charge the drawer or indorser. The parties, having fixed no time for the presentment of the bill or for the demand of payment of the note, have left it to be governed by the circumstances of the case; and

what constitutes reasonable diligence, or such as shall charge the drawer or indorser, which implies that the holder has some latitude of discretion, is a question which cannot be settled by any rule alike applicable to all cases, but must, from its nature, be determined by an application of the general principle to the facts attending each particular transaction. It is manifest, therefore, that there are many things that would influence the judgment of the court and be deemed sufficient to excuse delay and inattention in such cases, which could not affect the determination of a case like this, where the holder may be said to have no discretion at all, the time for presentment and notice being specifically fixed by law. No case can be found where the mere sickness of the holder of a bill or note payable at a time certain, has been held to justify a failure to present it on the day of its maturity. It is true that the elementary writers, generally, say that the sudden illness or death of the holder or his agent may constitute an excuse for the want of regular notice to any of the parties, provided it be given as soon as possible after the impediment is removed. Cases may arise when the death or illness of the holder or his agent will excuse; but the illness must not only be shown to have been sudden, but likewise so severe as to have prevented the owner or agent from employing another person to make the presentment or give the notice, as well as to have precluded the possibility of his doing so himself; and then it must be shown that the proper steps were taken as soon as the disability was removed.

Applying these principles to the present case, it will be very readily perceived that the facts disclosed by the record constitute no valid excuse for the omission of the plaintiff's testator to present the note and give notice of its non-payment on the day it became due; nor for the subsequent neglect of the plaintiff to do so in case the testator had been lawfully excused.

Again, if nothing was lost by the testator's omission, still it seems clear that the subsequent neglect of the plaintiff has discharged the defendant. For if it be admitted that she might have presented the note and given notice of non-payment even after probate of the will and the issuing of letters testamentary to her, it is not shown that she used due diligence, or any diligence at all in that respect.

The excuses that the defendant was on his way to Europe at the time the note became due, so that notice could not be served on him, and that McDonald, the maker, was then insolvent, are clearly no better. The temporary absence or removal of the indorser from his place of residence or business is no reason why the note should not be presented; nor does it relieve the holder from the responsibility of endeavoring to notify him of the maker's default. After presentment and default, the giving of notice is a question of diligence on the part of the holder, and if he exercises proper care and prudence for that purpose, the indorser will not be exonerated, even though he does not receive actual notice. In case of the temporary removal of the indorser, notice put into the keyhole of the outer door of his dwelling house, which was found fastened up, has been held sufficient.

As to insolvency, it has long been settled that it does not discharge the holder from giving notice, though the maker be insolvent at the time of indorsement and that be known to the indorser.

17. Excuse for Failure to Make Presentment.

Dunbar v. Tyler. 44 Miss. 1.

Dunbar, at Natchez, drew a bill on R. Nugent & Co. at New Orleans in favor of Britton & Company, who indorsed the bill to Tyler. After acceptance and before maturity, New Orleans was captured by the United States forces and no demand for payment was made until after the close of the Civil War. Dunbar contends that he is discharged by reason of the delay in presentment.

Held, that a drawer is not discharged by failure to make presentment when it is prevented by a state of war.

Simrall, J.

The law enjoins upon the holder of negotiable paper promptness and diligence with respect to it. If it is payable at sight or on demand, it must shortly be put in circulation or presented to the drawee. If held up by the payee an unreasonable time, the party from whom he took it, will be discharged. The theory of a bill of exchange originally was an appropriation of the funds of the drawer in the hands of the drawee, to the payee, or his order; and he should be entitled, therefore, to prompt and strict notice, if the fund is not paid over, so that he may take measures to protect himself from loss. If the bill is payable at a particular time, it must be presented to the acceptor for payment, when due. It is absolutely incumbent on the holder to do this, if he expects to look to the drawer, in the event of dishonor. If he has made every effort, and used proper diligence to make the demand, but has been hindered and disappointed by impediments not referable to himself or his laches, he will be excused; provided he gives notice of his efforts in this behalf to the drawer; for these shall be accounted to him of equal worth with an actual demand. If by imperative circumstances above his control, he has been delayed in the demand, so that he could not make it when the bill was due, he will also be excused; provided he perseveres in his diligence, and calls upon the acceptor as soon as he reasonably can; and of all this give prompt advice to the drawer. The duty to make demand for payment on the day of the maturity of the bill is peremptory; hardly anything short of inevitable necessity will excuse the omission. The bankruptcy, insolvency, absconding, or death of the acceptor, before or at the time of its falling due, does not absolve from the duty. In case of the death of the acceptor, presentment should be made to his executor or administrator, if he or his residence can, on inquiry, be found. If the legal representative cannot be

found, then presentment should be made at the domicile of the deceased. The loss of the paper does not discharge the holder from this duty; the demand should be made of the acceptor, with a tender of indemnity, and if he refuse, protest should be made and notice should be given.

Failure to present may be excused on account of the political condition of the country where the bill is drawn or where payable, rendering it impracticable, or by any other reasonable cause, not referable to the negligence of the holder. So, also, will the prevalence of a malignant disease, as yellow fever, or cholera, the sudden illness or death of the holder, the stoppage of the mail, by ice or snow, war, or other circumstances interrupting intercourse, or other accident or inevitable casualty. But in all such cases, the presentment must be made within a reasonable time after the obstruction or hindering cause is removed. Want of funds, and the absence of reasonable expectation of the payment of the bill, or of its acceptance, or of a right to draw, may release the holder from the necessity of giving notice of non-payment to the drawer. But we find in the authorities no excuse for non-presentment, to the acceptor, except some inevitable cause or casualty over which he had no control. The dispensation, with notice for any reason, is of modern origin. The first departure from the general rule was, "If found by the holder, that, from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands." The reason assigned was, that the drawer had no "right" to draw, and could not be injured. In the course of business and commercial transactions, persons might draw bills, with the best reason for expecting acceptance and payment, although they might have no funds, at the time, in the hands of the drawee and acceptor to meet it. In such condition of the dealings of parties, the reason for giving notice would apply.

The rule recognized in this court is, in order to dispense with notice, "it must be shown that the drawer, from the time of making the bill to the time when it was due, had no property or effects in the hands of drawee or acceptor, and no right on other grounds to expect that it would be paid."

The single fact of want of funds at the maturity, did not dispense with notice. Presentment for payment could not be made because the city of New Orleans was, at that time, in the military possession of the United States forces, and the holder of the bill was at Natchez in this state. Intercourse and business became unlawful.

This condition of things relieved the holder from the obligation to demand payment of the bill from R. Nugent & Co., at New Orleans; at its maturity. But so soon as intercourse and business was re-established, after the close of the war, as it was, by the proclamation of the President in July, 1865, it became incumbent on the holder, within a reasonable time, to make the demand. The insolvency of the acceptors is no sufficient reason for not doing so, nor is the failure of the drawer to make provision for the bill. As a precedent condition to hold the drawer, this demand must have then been made,

if, upon inquiry, the acceptors could have been found. The holder is under a perpetual duty to diligence with respect to the paper, if he proposes to hold the drawer. The suspension of intercourse, during the war, made a demand at maturity impracticable; but so soon as the obstructing cause is put out of his way, he must instantly persevere in his diligence. It was his own laches that he did not make this demand.

18. Waiver of Presentment.

Bessenger v. Wenzel. 161 Mich. 61.

The Marvel Motor Company made a note payable to the order of Bessenger, which was indorsed on the back by Wenzel as an accommodation indorser. There was evidence that all parties knew that the maker had not sufficient funds to pay the note at maturity, that there was an agreement to renew the note, and that the defendant, knowing there had been no presentment, assented to continue his liability. Wenzel was not given notice of non-payment on maturity. Bessenger, who brings suit against Wenzel on his indorsement, contends that presentment and notice were waived by him.

Held, that presentment was waived.

Moore, J.

Section 84 of the negotiable instruments law provides that presentment for payment may be dispensed with by waiver of presentment, express or implied.

"Any act, course of conduct, or language of the drawer or indorser calculated to induce the holder not to make demand or protest or give notice, or to put him off his guard, or any agreement by the parties to that effect, will dispense with the necessity of taking these steps, as against any party so dealing with the holder. And even though a statute requires [that] the waiver of demand and notice, to be valid, must be in writing, it has been held that the course of conduct of the indorser may be such as will estop him from denying that the note was duly protested. Where the party told the holder 18 months before maturity not to protest it, as it should be paid at maturity, it was held a waiver of demand and notice. So where the indorser informed the holder that the maker had absconded, and requested forbearance. So where, on the first day of grace, the indorser requests time, and says that an arrangement will be made, notice is waived; so where the drawer or the indorser informs the holder that the bill will not be paid, or that he cannot pay it when due, it is a waiver of demand, protest, and notice."

"It is a well settled doctrine both in England and in the United States that if the drawer or indorser, with full knowledge of the

neglect of the holder to exercise due diligence, promises to pay the bill or note, or in any way unequivocally assents to continue his liability as though due diligence had been used, he is held to have waived the consequences of the laches, and will stand in the same position as if he had been regularly charged by presentment, demand, and notice."

It is the claim of the plaintiff that not only did the corporation know that it had no funds in the bank with which to pay the note, but that the indorsers knew of this fact and had assured him that the note could not be paid at maturity. To have presented this note would have been an idle ceremony. If plaintiff's version is to be believed—and the jury evidently did believe it—neither the corporation nor the indorsers expected the note to be presented.

19. Effect of Waiver of Protest.

Bank of Montpelier v. Montpelier Lumber Co. 16 Ida. 730.

The Bank of Montpelier sues the Lumber Company and a number of accommodation indorsers upon a note made by the Company to the Bank. The indorsers wrote "protest and notice of protest waived" on the back of the note. The Bank contends that this excuses it from making presentment and demand.

Held, that under the statute, waiver of the protest implies waiver of all steps necessary to establish the liability of indorsers.

Ailshie, J.

As to whether a waiver of protest and notice of protest amounts to a waiver of presentment and demand for payment is one on which the courts are not in harmony. Some of the courts have held that these contracts of waiver must be strictly construed, and that the indorser will only be held to have waived such requirements as are specifically covered by the language used in his contract. Other courts have been more liberal, and incline to hold the indorser to the intent of his contract as the language employed is generally and popularly understood. Accordingly, it has been held that a waiver of protest and notice of protest is a waiver of presentment and demand, and all those acts necessary to bind the indorser for the payment of the debt.

It is true that, technically speaking, the word "protest" only applies to and covers the formal writing and declaration made by the officer, who is ordinarily a notary, stating that the bill or note was duly and regularly presented in accordance with the laws governing commercial paper, and that payment was refused, and that he thereby formally protests the same for non-payment. This, however, does not cover the meaning of the word as generally used in commercial transactions and as it is commonly understood in the business world. In its popular sense it includes all the steps necessary to fix the

liability of the indorser, and this necessarily includes demand of payment, refusal to pay, and notice.

Under the provisions of Sec. 82 of the Negotiable Instruments Act, "Presentment for payment is dispensed with: . . . Third. By waiver of presentment, express or implied." Sec. 109 of the same act provides that: "Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be expressed or implied." Sec. 111 says: "A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor."

Under these express provisions of the statute, and in view of the popular and generally accepted meaning of the term "protest," we have no hesitancy in holding that an indorser who waives "protest and notice of protest" thereby waives and intends to waive presentment and demand and notice of the same and of the dishonor of the paper.

B. Notice.

1. Rules Under Negotiable Instruments Law.

Revised Laws of Massachusetts. Chapter 73.

Section 113. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

Section 120. Where the person giving and the person to receive notice reside in the same place notice must be given within the following times:

1. If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following;
2. If given at his residence it must be given before the usual hours of rest on the day following;
3. If sent by mail it must be deposited in the post office in time to reach him in usual course on the day following.

Section 121. Where the person giving and the person to receive notice reside in different places the notice must be given within the following times:

1. If sent by mail it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there is no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail if it had been deposited in the post office within the time specified in the last sub-division.

Section 124. Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Section 125. Where a party has added an address to his signature notice of dishonor must be sent to that address; but if he has not given such address then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or
2. If he lives in one place, and has his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in sections eighteen to two hundred and twelve, inclusive, it will be sufficient, though not sent in accordance with the requirements of this section.

Section 130. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate notice must be given with reasonable diligence.

Section 131. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. Where the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

Section 132. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

2. Sufficiency of Notice.

The Cayuga County Bank v. Warden. 1 N. Y. 413.

The bank, holder of a note made by S. Warden, sues the defendants as indorsers. The defendants claim that the notice was not sufficient on account of a misdescription of the amount due as set forth in the notice.

Held, that a notice is sufficient if it identifies the instrument and indicates that it has been dishonored.

Jewett, C. J.

There is no question but that due presentment for payment and notice of non-payment to the indorsers of a promissory note, are conditions precedent to the liability of the indorsers, and that the notice may be either written or verbal. Such presentment of the note in question was made and notice of non-payment in the form shown by the evidence given. The only material question then is, whether that notice is sufficient. It is well settled that there is no precise form of words necessary to be used in giving notice; it is sufficient, if the language used is such as, in express terms or by necessary implication, to convey notice to the indorsers of the identity of the note, and that payment of it on due presentment has been neglected or refused by the maker.

The fact which was necessary to be established by the plaintiff is that the defendants had due notice of the dishonor of the note in question. The notice, such as it is, was given at the precise time and place required by law. The evidence shows that this note was given for a balance due upon and in renewal of a former note payable at the same bank on the 11th of November, 1844, made by S. Warden and indorsed by the defendants, to whose order it was made payable. But it is contended that the notice merely informs the defendants of the non-payment of a note drawn and indorsed respectively by the defendants for \$300, and not of a note for \$600, indorsed by the defendants jointly. Concede that such variance or misdescription exists. It is well settled in accordance with good sense that an immaterial variance in the notice will not vitiate it. The variance must be such that, under the circumstances of the case, the notice conveys no sufficient knowledge to the indorsers of the identity of the particular note which has been dishonored.

3. By Whom Notice Should Be Given.

Lawrence v. Miller. 16 N. Y. 235.

Boerum made a note dated at New York which was indorsed by John B. Miller, the defendant. It was presented for payment on behalf of the plaintiff, the holder, by a notary, who upon non-

payment sent notice to Miller, addressed generally to New York City. Notice was also left at the office of another John B. Miller in New York, who was not the real indorser, as the latter lived in Williamsburg. It appeared that the plaintiff probably knew the address of Miller, but the notary acting for the bank at which the note was payable was not given this information.

Held, that notice must be given by the holder, not by a stranger, and that knowledge of the holder as to the residence of the indorser will bind any party giving notice in his behalf.

Bowen, J.

In order to charge the indorser of commercial paper, notice of its dishonor, in cases where a notice is necessary, must be given by the holder thereof, or by some one of the parties thereto. Notice by a stranger is not sufficient. An agent of the holder or other party may give the notice; but in doing so he represents and acts on behalf of his principal, and that, too, although he may be a notary and act in his official character. If the residence of the indorser is known, or by the exercise of due diligence can be ascertained, he is entitled to notice.

In this case, the referee has found that the notary into whose hands the note in suit was placed, with directions to demand payment of the maker and give the notice, did not know the residence of the indorser, and, so far as he was concerned, and as between him and his principal, had made all necessary inquiries to ascertain it. But it was the holder of whom the law requires diligence; and, if he knew the residence of the indorser, the latter was entitled to notice. The referee has not found, and there is nothing in the case showing affirmatively that the residence of the indorser was in fact known to the plaintiff, the holder of the note; and it is claimed by his counsel that there is no presumption that he had such knowledge. As there is no other indorser of the note than Miller, the plaintiff must have been his immediate indorsee. The complaint so avers, and the legal presumption is, that the paper was transferred by the defendant to the plaintiff; and if such was the fact, he must have known the defendant, and it is to be inferred that he knew the defendant's place of residence. If, when he purchased the note, he did not know, he should then have made the inquiry, and it must be presumed that he did so. If the defendant was an accommodation indorser, and the note was in fact transferred by the maker to the plaintiff, he then should have inquired of the maker as to the residence of the indorser.

It appears, affirmatively, that no instructions were given by the plaintiff to the notary relative to service of notice, or information communicated to enable him to give the notice, as the referee has found that the latter called at the place of business of the former for the purpose of obtaining information, and did not succeed in finding him.

But upon the supposition that the residence of the defendant was unknown to the plaintiff, inquiry should have been made of the makers. Due diligence required that this should be done. It does not appear where the maker resided; but the fact that the note was dated and payable in the city of New York is some evidence that he resided there, although no evidence of the residence of the indorser.

It is not to be supposed that the plaintiff took the note without knowing anything of either of the parties thereto.

4. Where Notice Is to Be Given.

Bartlett v. Robinson. 39 N. Y. 187.

Bartlett sues Robinson as indorser of a note made and dated at New York. Robinson indorsed as of "214 E. 18th Street," where he resided. Notice was sent to him, addressed simply "City of New York," and it did not reach him.

Held, that when an address is given, notice must be sent to that address in order to charge an indorser.

Woodruff, J.

In all cases in which the indorser fails to receive notice (he having done nothing to waive or dispense with it), the question of liability becomes one of diligence. Has the holder used reasonable diligence to give the indorser notice?

In the earlier history of the subject, it was necessary to carry the notice, or send it by some messenger, so as to be able to prove its delivery. When communication was established by regular post, under such governmental or official responsibility that a presumption of safe carriage was warranted, and the usages of business men to take their correspondence from such officials, in due course, were recognized, then, reasonable diligence was held satisfied by the immediate dispatch of notice by the post, properly addressed, to the indorser.

So, delivery of notice at the residence or usual place of business is held reasonable diligence, because the habits of business and of life make it unreasonable to require the holder to pursue the person to whatever place he may, at the time, happen to be, and also because, presumptively, and according to the ordinary experience of men, a notice so left will come to his hands.

And so, also, when the residence is unknown, then diligence in the endeavor to find the person or to learn his residence, or place of business, is deemed all that is reasonable to require, and that will stand in the place of notice.

Every relaxation of the rule that actual notice shall be given is founded on the idea that reasonable convenience in respect to the mode of giving the notice, and reasonable diligence in the endeavor to bring it home to the indorser, should stand instead thereof, or be deemed equivalent to actual notice; and, therefore, it shall avail to

the holder whether it is effective in bringing notice home to the indorser or not.

But, immediately out of this relaxation grows another correlative right of the indorser to prescribe the place to which such notice may be sent, when he makes his indorsement. He enters into the contract, presumptively, with knowledge that he may receive personal notice, or that the notice may be sent to his residence or place of business. He knows what contingencies may happen under which notices, so left, may fail to reach him in due season. He may know of arrangements of his own which make it important that, in order to reach him in due season, the notice should be forwarded or delivered at a particular place.

Now, it is settled that, if he designate such place, the holder may give notice at that place. This is so settled, because it is reasonable diligence on the part of the holder to deliver the notice at the place where the indorser has appointed to receive it, and because, to hold that such notice is not sufficient is to permit the indorser to mislead the holder, and practically to defraud him.

The designation of the place by underwriting, at the time of his indorsement, is, therefore, an invitation to the holder to deliver a notice addressed to him as indorser at that place, and concludes him so that he may not deny that, for all the purposes and conditions of the indorsement, that shall be deemed his residence or place of business.

If he has actually removed, and that fact is known to the holder, another question would arise, but in the first instance it is clear that a notice at that place should be deemed sufficient to bind him.

I think that such designation should be deemed a qualification of the indorsement, and import that notice shall be personal or by delivery at the place designated.

5. Where Notice Is to Be Given.

Adams v. Wright. 14 Wis. 408.

Adams, the holder of a note which was not paid at maturity, sues Wright as indorser. Notice was sent Wright by leaving it at his house in charge of a boy, Wright's son.

Held, that notice of dishonor is sufficiently given by leaving it at the residence of the indorser.

Dixon, C. J.

It is very generally said in the books, and the doctrine is laid down without any apparent limit or qualification, that the service by leaving the notice at the dwelling house or place of business is equivalent to a personal delivery to the party to be notified. If it be not personally given, then it will be sufficient if it is given or left at or sent to his domicile or place of business. "With respect to the mode of giving the notice, personal service is not necessary, nor is

it requisite to leave a written notice at the residence of the party, but it is sufficient to send or to convey verbal notice at the counting-house or place of abode of the party, without leaving notice in writing; and the giving such verbal notice to a servant at his home, the defendant having left no clerk at his counting-house as it was his duty to do, suffices." This is the language of the books generally, and no case has fallen under our observation where it has been held that the absence of the party to be notified was a condition necessary to sustain service by leaving the notice at his place of abode or business; though it is said that the notice must be personal, or something tantamount, such as leaving it at the dwelling house or place of business of the party, if absent. Nor does any case seem to have arisen requiring an accurate definition of the manner in which service by leaving notice at the domicile or place of business, when found open and occupied, shall be performed. Where the particular mode of service did not appear, I suppose the cases have gone off on the reasonable assumption that an officer engaged in a duty of that kind would perform it with proper care and prudence, and use the means most likely to attain the object in view—that he would go to the place of service and inquire for the party to be notified, and, if present, deliver it to him in person, or if that should be unsuitable or inconvenient, that he would hand it to a servant or some inmate of the place with a request that it be so delivered; and if absent, that he would in like manner leave it with some person residing or doing business therein, with a similar request. Service at the place of business must be during business hours, but service at the residence is not so regulated. It will be sufficient if made during any of the hours when members of households are attending to their ordinary affairs. It will be sufficient if it shows service at the residence or place of business, which constitutes legal diligence, and the special circumstances will be presumed until the contrary is shown.

6. Where Notice Is to Be Given.

Walker v. Stetson. 14 Oh. St. 89.

Stetson as indorsee sues Walker on two bills of exchange, payable to the order of Walker, drawn by Walker in Cleveland on Gleason. After dishonor of the bills, notice was sent to Walker at Chicago, where he was temporarily staying on business, although he lived in Morristown, N. J. The notice never reached Walker.

Held, that notice of dishonor may be sent to the place where a party receives his mail or where he has sojourned; but a temporary sojourn in a locality is not within the rule.

Ranney, J.

The parties in this case not residing in the same place, there is no doubt that it was a proper case for sending the notices by

mail, and in such cases it is well settled, that putting into the post office seasonably a notice properly directed, is, in itself, due diligence, or constructive notice, and will be sufficient although it never reaches the party to whom it is directed. As to the place to which the notice should be directed, it is equally well settled that it should be sent to the drawer's or indorser's residence or place of business, if either is known to the holder, or, upon diligent inquiry, can be ascertained; and if neither are known nor can be found, the law dispenses with any notice whatever. But while this is the general principle, the spirit of the rule certainly is, that the notice should be sent to such place that it will be most likely promptly to reach the person for whom it is intended; and, hence, in its application to particular cases, it has often been held that a notice is sufficient if sent to the post office where the party usually receives his letters, although not that of his residence, as well as to that where he resides; and, in all cases, the notice may be sent to the place pointed out by the drawer or indorser, and in general will be sufficient, both in reference to himself and parties who stand behind him on the bill. Indeed, it is suggested in the present case that the statement made by the plaintiff to the defendant in error sufficiently indicated Chicago as the place to which the notices might be sent. Whatever of weight this suggestion may properly have, it can only be considered by us, when the case in the court below appears to have been decided upon that ground. As yet, this consideration has not been passed upon in that court.

How, then, in view of the foregoing principles, stands the case before us? Was Chicago, in the sense of the legal rule, so far the residence or place of business of the party as to make the notice sent there, constructive notice of the dishonor of the bills? A very careful examination of all the evidence now contained in the record has fully satisfied us that it was not. Upon this point there is no conflict in the evidence. The plaintiff below says the defendant informed him he was going to Chicago "to dispose of a quantity of lumber, which he was about shipping to that place, and should return from there to Cleveland"; that he knew the defendant had been to Chicago, but did not know that he was there when the notices were mailed, and had reason to believe he did not receive them there, as he was soon afterward back to Cleveland. The defendant says he went to Chicago, and was there from the 1st to the 24th of November, "disposing of a quantity of lumber," and in the afternoon of the day last named, he left Chicago and arrived at Cleveland on the morning of the 26th; that he had no permanent business at Chicago, and was there for a temporary purpose only, and never received the notices sent.

7. Actual Receipt of Notice Sufficient.

Whiteford v. Burckmyer. 1 Gill (Md.) 127.

Burckmyer & Company, the holders, sue Whiteford as indorser of a bill of exchange which was dishonored. Notice of

dishonor was orally given to Whiteford by an agent of the holders, who told Whiteford that he had a notice for him. Whiteford, however, told the agent to take the notice to Chafee, the drawer of the bill, which he did.

Held, that actual receipt of notice is sufficient.

Chambers, J.

It is not necessary that notice be sent by mail. The legal presumption is, that where there is a regular daily mail, it affords an early conveyance and a safe one, and a party is not bound to use one more expeditious or certain, but he may do so, and surely it would be no cause of exception to the regularity of the notice, that it was received in advance of the mail. Neither is it necessary, however it may be prudent, that the notice if sent by the mail be enclosed to the address of the person to be charged. If a party be willing to hazard the receipt of notice by his correspondent, and the due attention of the correspondent to the service of the notice, he must abide the result. But if the party to be charged receive the notice in due time, he cannot object to the means which the owner or holder of the bill has employed.

8. When Notice Must Be Given.

Phelps v. Stocking. 21 Neb. 443.

Phelps, an indorsee of a note, sues Stocking as an indorser. Phelps gave notice of non-payment to Stocking, who resided in the same town, by mailing it on the day of dishonor. It was received during the forenoon of the following day.

Held, that when the parties reside in the same place, notice by mail is sufficient if received within the time that it would otherwise be received.

Maxwell, C. J.

In this case the testimony is undisputed that Stocking received the notice the next day after the failure to pay the note. It certainly could make no difference to him in what manner he received notice. One of the objects in requiring personal service of notice of protest, is to give the indorser a fair start with others in pursuit of the property of the defaulting principals. If in such case it could be shown that the indorser did not receive the notice until several days after the same had been placed in the post office, such notice would not be sufficient, as there is an implied agreement that the indorser shall be notified within a reasonable time after the dishonor of the note.

Where a person indorses commercial paper payable at a distant place, he by implication agrees to receive notice of dishonor through

the post office, as that is the usual channel of communication between distant points. This rule, however, does not apply to an indorser of paper payable at a place situated within his own post office delivery. But where the indorser receives notice through the post office within a reasonable time, so that he is enabled to take proper steps for his own security, he will be bound thereby, even if such notice was mailed in the post office at which he received it.

9. When Notice Must Be Given.

Smith v. Poillon. 87 N. Y. 590.

Smith, the holder of a note which was not paid at maturity, sues the defendants as indorsers. Notices of dishonor were mailed to the defendants, who lived in another place, by depositing them in the mail the day following dishonor.

Held, that when parties live in different places, notice of dishonor given the day following dishonor is sufficient.

Earl, J.

It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this state. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law.

10. Notice Given By Indorser to Prior Indorser.

Linn v. Horton. 17 Wis. 151.

The plaintiffs, holders of a note made by Yates & Gray, which was not paid at maturity, sue Horton as indorser. Other indorsers also appeared on the note. Notice for Horton and the other in-

dorsers was sent to the last indorser, an indorsee for collection, by the bank to which the note had been sent for collection. This indorser immediately forwarded the notices to the plaintiffs, who in turn at once forwarded to Horton the notice intended for him. It was in fact never received by Horton.

Held, that each party has the same time in which to notify previous indorsers that the last party had in which to notify him.

Dixon, C. J.

It is an established principle of mercantile law, that if the holder of a bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given, in due time, by the other parties, it will inure to the benefit of the holder, and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. And it is no objection to such notice that it is not in fact received so soon by the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he receives it. And the same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next.

For the purpose of receiving and transmitting notices, those who hold at the time of protest, and those who indorse as mere agents to collect, are regarded as real parties to the bill or note; the former as holders in fact, and the latter as actual indorsers for value.

It follows from these principles that the proper steps were taken to charge the defendant Horton as indorser.

11. Waiver of Notice.

Linthicum v. Bagby. 131 Md. 644.

Kriener gave notes for supplies to Linthicum and Waidner, the plaintiffs. These notes were indorsed by Kriener's mother, and suit is brought against Bagby, as executor of her estate, upon indorsements made by her. During a period of fifteen years, Kriener had constantly renewed notes in favor of the plaintiffs, all of which were indorsed by Mrs. Kriener. In no case was notice given her of non-payment, but renewals were always effected with her indorsement. The question is whether this course of transactions, involving in all about a hundred notes, is sufficient to indicate an implied waiver of notice of dishonor.

Held, that waiver of notice may be implied from conduct.

Urner, J.

The Negotiable Instruments Act provides: "Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied." This provision is declaratory of a well settled principle of the common law.

A waiver of notice of dishonor may be implied by any conduct or words of the indorser by which the holder of the note is reasonably induced to believe that such waiver was intended. Waiver "may result from implication and usage or from any words or acts which by fair and reasonable construction are of such a character as will satisfy the mind that a waiver was intended, or which will justify the holder in assuming that the indorser intended to dispense with notice, or to induce the holder to forego the usual steps necessary to fix the liability of the indorsers."

In this case a long and definite course of dealing had established a regular system of renewals under which the payees of the notes dispensed with formal notice of dishonor, and notwithstanding such omission, the same continuing indorser invariably joined in the successive renewals. If the indorser herself had habitually brought the renewals to the plaintiffs after the preceding notes had matured and notice of dishonor had not been given, it would hardly be disputed that such a practice, when continued uninterruptedly for fifteen years, would have justified the belief on the part of the plaintiffs that formal notice to the indorser of presentment and non-payment was intended to be waived. Under such circumstances it would doubtless be conceded that the jury could infer from the indorser's conduct an implied assurance to the plaintiffs that notice of dishonor might continue to be safely omitted. But the proof of waiver is supposed to be deficient because it does not show affirmatively that the indorser actually knew of the conditions under which her numerous indorsements were used. As she is not proven to have been informed that the notes she so freely indorsed for her son would be delivered by him to the plaintiffs in renewal, sometime after maturity, of other notes bearing her indorsement, it is argued that an essential element of the proof of waiver has not been supplied. There would be greater force in this argument if the notes had been complete when they left the indorser's hands. But they were blank when they received her indorsement and when they were presented to the plaintiffs. By indorsing them in that condition she confided them to her son's discretionary use without limit as to time, method or amount. It was a permissible inference from such a course of conduct, habitually pursued, that the indorser intended to place her credit continuously at her son's disposal, without restriction as to his use of the notes, and with full assumption of such liability as might be thereby incurred.

12. When Delay is Excused.

Studdy v. Beesty & Higgins. 60 *Law Times Rep. (N. S.) (Eng.)* 647.

Studdy sues Higgins, the drawer and indorser, and Beesty, the acceptor, of a bill of exchange. Studdy was unable to find Higgins in order to give him notice upon non-payment, although due diligence was used in searching for him. Having finally located him, Studdy sues without having given notice.

Held, that when delay in making presentment is excused, notice must be given as soon as possible upon removal of the cause constituting the excuse.

Lord Esher, M. R.

By Sec. 50: "(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence. (2) Notice of dishonour is dispensed with—(a) when, after the exercise of reasonable diligence, notice as required by this Act," that is, before action brought, "cannot be given to, or does not reach the drawer or indorser sought to be charged." *Prima facie*, the notice must be given, not only before action brought, but within a reasonable time after the dishonour. If the cause of the delay arises from circumstances beyond the control of the party giving the notice, he is excused for not giving it within what, in other circumstances, is held to be a reasonable time. But if the cause of the delay ceases to operate before action brought, the notice must then be given with reasonable diligence. The only circumstances in which notice of dishonour is dispensed with under sub-sect. 2, paragraph (a), is where, after the exercise of reasonable diligence, it cannot be given at any time before action brought. Now in this case the plaintiff did not give notice of dishonour before the issue of the writ. He had attempted to give notice at the time of the dishonour of the bill, but had been unable to find the defendant. That is not enough to excuse him, because he was in a position to have given notice before the issue of the writ. Having made the attempt to serve the notice, he did not take any further pains in the matter. It is said on his behalf that business could not be carried on if such continuous diligence in serving the notice was necessary. The answer to that argument is that that diligence has been required since the time of Lord Ellenborough, and business has nevertheless been carried on.

13. When Notice Need Not Be Given.

Wollenweber v. Ketterlinus. 17 *Pa. St.* 389.

Wollenweber drew a bill of exchange on Baskin in favor of

Ketterlinus, payable ten days after sight. Baskin refused to accept the bill, as he did not owe the money and had no funds belonging to Wollenweber. Wollenweber was not notified of the refusal of Baskin to accept, and now defends on that ground.

Held, that a drawer who has no funds in the hands of a drawee is not entitled to notice of non-acceptance.

Coulter, J.

A drawer, who either has funds in whole or in part in the hands of the drawee, or who has a reasonable ground of expectation that the drawee has funds to meet the draft, is entitled to notice, if the bill is refused, and, of course, the bill or draft ought to be duly presented. But the converse is equally true. The whole doctrine on the subject may be summed up in two propositions. First, if the drawer has any funds in the hands of the drawee, no matter whether they be sufficient to meet the draft or not, he is entitled to notice, because he may suffer injury to some extent for want of it. Second, if the drawer is without funds in the hands of the drawee, yet if from circumstances and transactions he has a well grounded belief that he has funds, and that the bill will be duly honored, he is entitled to notice, and the bill ought to be presented.

[Wollenweber] had no funds in the hands of the drawee, nor any just right or well grounded expectation that he had any. He was, therefore, not entitled to notice, and suffered no injury from the bill not having been regularly presented.

14. When Notice Need Not Be Given.

National Copper Bank v. Davis County Bank. 47 *Ut.* 236.

Steed drew a check on the Davis County Bank payable to the order of Guthrie, who indorsed it to the plaintiff bank. Steed stopped payment, but defends a suit on the check in part on the ground that no notice of dishonor was given him.

Held, that a drawer of a negotiable instrument who has countermanded payment is not entitled to notice.

Straup, C. J.

A further point is made of the failure to allege notice of dishonor to Steed, the drawer, and that such notice was essential to render him liable. Under the statute, notice of dishonor to the drawer is not required where he "has countermanded payment." It is not alleged as specifically as it might have been that Steed, the drawer, countermanded payment of the check; but there are sufficient general allegations in such respect—setting forth the check with the indorsement across its face "Pyt. stopped."

15. When Notice Need Not Be Given.

Westinghouse Electric and Manufacturing Co. v. Hodge.
181 Mo. App. 232.

The Hodge Electric Company made notes to Hodge, its president, who indorsed them to the Westinghouse Company in payment of an indebtedness of the Hodge Electric Company to the Westinghouse Company. The notes were signed by Hodge as president and were presented to him for payment. Hodge defends an action against him as indorser on the ground that he received no notice of non-payment.

Held, that notice of dishonor is not necessary to an indorser who is the person to whom the instrument is presented for payment.

Johnson, J.

Defendant argues there is nothing in the record to show that he had actual notice of the dishonor of the first unpaid notes, or that he "had any connection with said corporation after the date he signed them as president." It is conceded defendant was president of the company at the time he executed the notes on its behalf and as such was its chief executive officer upon whom creditors of the corporation would make formal presentation of their demands for payment. A proved condition or status is presumed to have continued in the absence of proof to the contrary, and we hold the finding of the court that defendant had actual notice of dishonor is supported by substantial evidence, since defendant is the person to whom the note was presented for payment. The Negotiable Instruments Act provides that notice of dishonor is not required to be given to an indorser "where the indorser is the person to whom the instrument is presented for payment." The purpose of giving notice is fully served when the indorser has actual knowledge of the dishonor and the law does not require the doing of a vain and useless act. Defendant was not entitled to formal notice of the dishonor of any of the notes, and it is immaterial whether the three notes of \$1000 each matured according to the terms expressed on their faces or on the date of their first default as provided in the contemporary contract. In either case defendant, being the person to whom they were presented for payment, had actual notice of their dishonor and was entitled to no other.

16. Protest Unnecessary Except on Foreign Bills.

Stephenson v. Dickson. 24 Pa. St. 148.

Dickson, the holder, sues Stephenson as indorser of a note of Lilford. Stephenson defends in part on the ground that the note

was not properly protested, although demand was made, and due notice sent him.

Held, that protest of a note is not necessary.

Knox, J.

All that is required to make absolute the liability of an indorser upon a promissory note is, that demand should be made upon the maker at the place fixed for payment upon the last day of grace, and that due notice should be given of non-payment to the indorser. A protest is an unnecessary act, and whether made on the day of the demand, the succeeding day, or not made at all, is wholly immaterial.

IV.

DISCHARGE.

A negotiable instrument is discharged:

1. By payment or cancellation.
2. By any other act which would discharge a simple contract to pay money.
3. When the debtor becomes the holder.

A person secondarily liable is discharged:

1. By the discharge of the instrument.
2. By the cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By valid tender of payment made by a prior party.
5. By a release of the principal debtor unless the holder's right to recourse is reserved (generally by agreement).
6. By agreement binding upon the holder to extend the time of payment by the principal debtor unless made with the assent of the indorser sought to be held.

When a person secondarily liable upon an instrument pays it, it may again be indorsed unless the person so paying is the drawer of a bill of exchange or an accommodated party.

A party may at any time renounce his rights against any other party to the instrument, but this affects him only and no other holder in due course.

When a negotiable instrument is altered in a material particular without the assent of all parties, it is void except against those who have authorized or assented to the alteration, and subsequent indorsers; but a holder in due course, not a party to the alteration, may enforce payment according to the original tenor.

1. Rules Under Negotiable Instruments Act.

First National Bank of McClusky v. Meyer. 30 N. Dak. 388.

Meyer, for the accommodation of Filbey and jointly with him, made a joint and several note to the plaintiff. He defends an action on the note on the ground that the real maker, Filbey, has been released by a judgment against him.

Held, that a maker is not discharged by the discharge of a co-maker jointly and severally liable.

Bruce, J.

Sec. 7004, Compiled Laws of 1913, reads as follows: "A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right."

Sec. 7005, Compiled Laws of 1913, reads as follows: "A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." Sec. 7076, Compiled Laws of 1913, reads as follows: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

Our holding is that, under favor of the negotiable instruments act, one who signs a promissory note on the face thereof, though he be in fact an accommodation maker and known as such to the holder, thereby becomes primarily liable for its payment; also, that such party may be discharged from liability in any one of the ways provided in said act, but not otherwise.

The fact that no personal consideration passed to the defendant, Meyer, and that this fact was known to the plaintiff, makes no difference in the law. No direct consideration to him, indeed, was necessary. If a suretyship at all, the suretyship is in the form of an independent and absolute undertaking. It is a contract whereby the surety becomes bound primarily to the creditor to save him harmless independently, and whether the principal debtor makes default or not. As we have before said, we are not here construing the common law or the law merchant, but the provisions of the negotiable instruments act.

2. Payment.

Mitchell v. Inhabitants of Albion. 81 Me. 482.

Whittaker, the treasurer of the town of Albion, issued a town order to Mary Bradstreet or bearer in payment of her salary as a school teacher. This order was returned upon payment to the treasurer, who issued it again in payment of the salary of one of the selectmen. The plaintiff holds through the selectman, and sues upon the order.

Held, that a negotiable instrument is discharged by payment.

Foster, J.

It is a principle well established that a promissory note, or order, made payable to a particular person, which has been paid by one whose duty it was to make payment, with no right to repayment from another party, is no longer a valid contract. In such case it has lost its vitality and cannot again become a valid security.

3. When Maker Becomes Holder.

Korkemas v. Macksoud. 131 App. Div. (N. Y.) 728.

Macksoud made a note payable to Maloof & Company, who indorsed it to the plaintiff. The note was not paid at maturity, and the plaintiff took it up at the bank which had become the holder. By accident, the note came into the possession of Macksoud again, and from that fact he claims that it was discharged.

Held, that although a note is discharged when the maker becomes the holder, the rule does not apply if that situation arises through accident.

McLaughlin, J.

Just how it could be supposed that the defendant upon the facts stated was not liable it is difficult to imagine. The defendant was the maker of the note; it was his obligation and he was primarily liable, and the fact that the plaintiff—the second indorser—saw fit, in order to prevent its being protested, to pay it on the day it fell due, did not discharge the defendant's liability. Section 200 of the Negotiable Instruments Law, which provides that a negotiable instrument is discharged when the principal debtor becomes the holder at or after maturity in his own right, has nothing to do with the question. The defendant never became the holder "in his own right." He was no more entitled to the possession of the note than if he had forcibly taken it from the plaintiff without payment. Plaintiff never intended to part with it without payment, and it requires something more than the possession of a promissory note, obtained either by accident or design, to extinguish the liability of the maker.

4. Alteration.

Hoffman v. Planters National Bank. 99 Va. 480.

Mrs. Hoffman, the defendant, agreed to indorse a note for the accommodation of Mrs. Woodruff. The note was to be signed by Mrs. Woodruff as drawer and by Mrs. Hoffman as indorser. By mistake, Mrs. Hoffman signed it in the place left blank for the drawer's signature so that when delivered to the bank it was an incomplete note drawn to Mrs. Hoffman's own order. A clerk of the bank changed the note by inserting Mrs. Woodruff's name as payee and later he secured the indorsement of Mrs. Woodruff.

Held, that this was a material alteration which released the plaintiff.

Cardwell, J.

There was no evidence whatever tending to show that the alteration made in the note was with the knowledge or consent of the plaintiff in error, or that she in any way ratified the alteration after knowledge of it was brought home to her. That it was a material alteration and avoided the note, as to plaintiff in error, is clearly settled, we think, by statute.

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made or authorized, or assented to the alteration, and subsequent indorsers."

"But when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

The first paragraph applies with all its force to this case, while the last has no application to it.

Section 125 of the act defines what constitutes a material alteration of a negotiable instrument thus: "Any alteration which changes (1) the date, (2) the sum payable either for principal or interest, (3) the time or place of payment, (4) the number or the relations of the parties, (5) the medium or currency in which it is to be paid—or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

Section 184 of the act defines a negotiable promissory note within the meaning of the act, and declares that, "Where a note is drawn to the maker's own order, it is not complete until indorsed by him."

These provisions of the statute are but declaratory of the principle of universal application, that a material alteration of a written instrument renders it void as to a party who has himself not made or authorized or assented to the alteration, and applies *a fortiori* in favor of an indorser.

5. Rights of Holder of Altered Instrument.

Public Bank of New York City v. Burchard. 135 Minn. 171.

Burchard, for his accommodation, made a note jointly with Knox. Knox fraudulently converted this note into a note of a corporation in which both were interested, and of which both were officers. He then caused Burchard's signature to appear as that of a personal indorser of the note. The bank, a holder in due course, sues Burchard personally upon this indorsement.

Held, that the holder of a note fraudulently altered may enforce it according to its original tenor.

Taylor, C.

Conceding that the note was executed as the individual note of Knox and Burchard, and that it has been changed so that it now purports to be the note of the company indorsed by Knox, Burchard and A. M. Knox, does this fact release Burchard from liability thereon? Burchard signed the note and also indorsed it. His signatures are genuine even if other signatures be forged. Plaintiff is a "holder in due course" within the negotiable instruments act. That act provides in section 5936, G. S. 1913:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

By virtue of this statute, a party to a negotiable instrument must respond to a "holder in due course" upon the obligation which he in truth assumed, notwithstanding the fact that the instrument may have been changed so as to import a different obligation.

Section 5835, G. S. 1913, provides: "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

Appellant seems to contend that this is the only section which applies to cases where a signature has been forged, and that section 5936 applies only to cases where an alteration has been made in the body of the instrument but not in the signature. We think the statute will not bear this construction. Where a signature is forged or made without authority, section 5835 provides that no rights can be predicated upon such forged or unauthorized signature, except against a party who is precluded from asserting the forgery or want of authority, but goes no further than to make such signature inoperative

and to bar the enforcement of rights founded thereon. The language is carefully chosen to confine the effect of the section to the specific points covered thereby. It does not purport to declare the instrument void, nor the genuine signatures thereon inoperative. It protects the party whose signature has been forged or affixed without his authority, but contains no provisions releasing other parties from whatever liability they may have assumed. To determine the rights of the holder of an altered instrument against such other parties, we must have recourse to section 5936. Under this section, "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." No claim is made that plaintiff was a party to the alteration in question or had any knowledge thereof. According to the original tenor of the instrument, appellant was a maker as well as an indorser, and liable unconditionally for its payment. According to the instrument as altered, he appeared to be only an indorser, and the verdict against him was rendered on the theory that his liability was that of an indorser. He is held to no greater or different liability than he in fact assumed and is not in condition to complain.

6. Cancellation.

McCormick v. Shea. 99 N. Y. S. 467.

McCormick sues Annie Shea as indorser on a promissory note made by Thomas Shea. Annie Shea's signature had been canceled.

Held, that an intentional cancellation of an indorser's signature discharges him.

Gildersleeve, J.

It is conceded that before maturity the indorsement of Annie Shea was canceled. This was done by a representative of defendant's attorney, who scratched out the indorser's name in the presence of plaintiff. The parties were negotiating with respect to claims of each against the other, and it is the contention of defendant that as a part of a compromise plaintiff consented to the cancellation of said indorsement. Plaintiff, on the other hand, claims he never authorized such cancellation and protested against the same. He further claims that there was no consideration for such cancellation. Even so, if he did, in point of fact, authorize and agree to this cancellation, the indorser was released, as a person secondarily liable on a negotiable instrument is discharged "by the intentional cancellation of his signature by the holder."

Negotiable Instruments Law, Laws 1897, provides that:

"A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative; but where an instrument

or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority."

In the case at bar the signature of the indorser appeared to have been canceled, and plaintiff claimed it was canceled without authority. The burden, therefore, was on him to show that it was so canceled without authority.

7. Discharge of Prior Party.

Couch v. Waring. 9 Conn. 261.

Couch, the surviving partner of Stebbins & Couch, sues Waring on a note made by Waterbury to Waring and by him indorsed to Stebbins & Couch. Stebbins & Couch had previously recovered judgment against the maker and had levied on real estate belonging to him. They recovered, however, a sum insufficient to pay the note and Couch now attempts to recover the rest from the indorser.

Held, that a discharge of a prior party precludes the holder from resorting to a subsequent party.

Bissell, J.

There is no principle better established than that a judgment against the maker discharges none of the subsequent parties to a promissory note. Nor does a mere technical satisfaction constitute, for them, any defense: As where the acceptor of a bill of exchange was charged in execution, and discharged under the lord's act. And where the maker of a promissory note, being taken in execution, was discharged under an insolvent debtor's act, it was holden, that the subsequent parties still remained liable.

So also, if the maker become bankrupt, and the holder prove his debt under the commission, and receive a dividend; this will not prevent him from resorting to the subsequent parties to the note. Nor will he be thus precluded, although he receive part payment from the maker; or levy a part against him; for this is for the benefit of all parties.

On the other hand, it is equally well settled, that if the holder give time to the maker, or take from him any new security payable at a future day, without the assent of the other parties to the note, they are thereby discharged from their liability.

So also, if the holder enter into a composition with the maker, or discharge him, or do any act, the effect of which is to discharge him, the subsequent parties to the note are also discharged.

What is the effect of these acts of the plaintiff? Is it not to discharge the maker of the note from all liability? That the plaintiff cannot again resort to him is clear beyond all doubt. This would be to defy all principle and all analogy.

The debt, as to him, is extinguished; and as against him, the maker has the highest discharge known to the law. He can have no relief even by petition for a new trial. Can he, then, by proceeding against the indorser, authorize him to resort to the maker? Or, in other words, may he do that indirectly which he has precluded himself from doing directly? It has been gravely contended that he may. It is said this action is sustainable, because the defendant may have his remedy over, against the maker of the note.

But here the holder has done the act which prevents him from resorting to the maker in all time. He has discharged him. Can he, then, without a violation of all principle, authorize a subsequent party to the note to do that which he can never do, and which he is prevented from doing, not by an act of the law, but by a course of proceedings entirely voluntary on his part?

8. Tender By Prior Party.

Spurgeon v. Smitha. 114 Ind. 453.

Smitha made a note to Spurgeon upon which the defendants were sureties. Smitha paid a certain amount upon the principal, and offered to pay the remainder when the note became due. Spurgeon, however, desiring to keep his money at interest, renewed the loan. The defendants contend that the tender released them from further liability as indorsers.

Held, that tender by a prior party releases an indorser.

Elliott, J.

The contract made by the creditor and the principal, wherein the former, after accepting part payment of the debt, reloaned the latter the remainder of the money due, released the sureties. Sureties, as is well known, have a right to stand upon the letter of their contract, and if a creditor assumes to change the contract he releases them from liability. The creditor, knowing that the appellees were sureties, made a radical change in the contract by reloaning part of the money due him to the principal, and he has lost all claim upon the sureties.

The act of the creditor, in refusing the money tendered him by the principal debtor, released the sureties. The sureties had a right to rely upon the performance of the contract by the principal and upon the acceptance of performance by the creditor. This much was implied in their contract, and as the creditor declined to accept performance when tendered him, he departed from the contract and released the sureties. A creditor impliedly undertakes that the debt may be paid at maturity, and if he refuses to accept the money due, when tendered him, he breaks this implied undertaking, and loses his claim upon the sureties, for the act is injurious to them.

A creditor who does any act inconsistent with the terms of the

contract, or prejudicial to the interests of sureties, releases them from liability. The refusal to accept the money tendered was, it is very clear, inconsistent with the terms of the contract, for the terms of the contract made it the duty of the creditor to accept payment when tendered him. It was also an act prejudicial to the interests of the sureties, for, if the creditor had accepted payment, they would have been effectually discharged. The authorities fully sustain our conclusion, although the reasoning upon which some of the courts proceed is somewhat different from that pursued by us; their reasoning having for its basis the theory that the refusal of the creditor to receive the money when tendered is a fraud upon the sureties.

We do not hold that a mere offer to pay will discharge the sureties; but we do hold that where the money is actually produced and an unconditional offer made to pay it at once to the creditor, and he refuses to accept it, and asks the debtor to retain it, the sureties are discharged. Where the money is actually produced, and the creditor does not object to the tender, but requests the debtor to retain the money, he can not subsequently insist that the tender was insufficient. The act of the creditor makes the offer of the money produced by the debtor a sufficient tender, for he so characterizes it by his act.

9. Extension of Time of Payment.

The Cape Charles Bank v. Farmers Mutual Exchange. 120 Va. 771.

The Cape Charles Bank, the holder of a note made by the Farmers Exchange, sues it and the indorsers. The note became payable Nov. 10, 1911, but nothing was paid upon it. Subsequently, without dissent by the indorsers, payments were made and credits entered until the note had been materially reduced. Thereafter, the makers sent a check for one hundred dollars as interest for about two months in advance. The indorsers contend that acceptance of this money constituted an agreement to extend the time of payment, and that they are accordingly released.

Held, that when time for payment is extended without the assent of the indorser, he is released from liability.

Sims, J.

Such parties [secondarily liable] will be released—

“By any agreement binding upon the holder to extend the time of payment or to postpone the holder’s right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved.”

This rule was the same at common law, hence the statute does

not aid us in the application of such rule to the question in controversy on the merits upon which the instant case turns.

The agreement in question contemplated by the above quoted statute and by the rule at common law which it enacts, need not be express. It may be implied from acts, declarations, facts and circumstances. Its form is immaterial. It may be by parol as well as in writing. It must, however, be a binding contract, enforceable at law or in equity. It must be supported by a valuable consideration. It must be for a definite period, however short. When implied in law it is still a contract in fact and not in law, and hence an actual meeting of the minds of the contracting parties is essential to such an agreement, to bring it within the operation of the statute and common law rule which the latter has enacted.

Whether such an agreement exists, is the ultimate question in every such case.

So in the case at bar it was a question of fact for the jury to ascertain with what intention the interest was paid and accepted in advance. The latter, in the absence of other evidence bearing upon such intention, would have been sufficient evidence that the intention was to extend the time of payment of the debt. But in the presence of other evidence the question of the existence of such intention was for the jury.

10. Reservation of Right of Recourse.

Second National Bank of Mechanicsburg v. Graham, 246 Pa. 256.

The Bank, the holder, sues Graham as the last indorser of a note drawn by the American Union Telephone Company to its own order, payable three months from date. The Telephone Company was placed in the hands of a receiver before maturity, and the receiver made another note collateral to the original note, which was protested. Graham defends in part on the ground that the acceptance of the new note constituted a release of the principal debtor.

Held, that an extension of time does not release indorsers if the right of recourse is retained.

Mestrezat, J.

The Negotiable Instruments Law provides that: "A person secondarily liable on the instrument is discharged: . . . by any agreement binding on the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." This was simply declaratory of the existing law. It is settled that if after maturity and for a consideration the holder of a negotiable note extends the time of payment for a definite period without the consent of the indorser,

the latter is relieved from liability. A mere taking of another instrument as collateral, however, is not such an extension of time as will discharge the indorser. An agreement not binding on the holder will not discharge the indorser. Nothing short of an agreement to give time, which binds the creditor, and prevents him from bringing suit against the principal, will discharge a surety. Whether the acceptance of a new note is in extinguishment or payment of the old note or is as collateral security depends upon the intention of the parties, the presumption being that it is only a further security for the indebtedness: and the burden of proving that the new obligation has been taken in payment is on the party asserting it. If the evidence is conflicting or the facts are in dispute, the question is for the jury. The receipt of interest in advance for a period beyond the maturity of the note is *prima facie*, but not conclusive, evidence of an agreement extending the time of payment. Evidence that the notes deposited as collateral security for the payment of other notes were renewed from time to time, interest thereon collected in advance, and the time of payment extended will not of itself support a finding that the holder of the original note extended the time of payment of the latter.

The act does not prevent the holder of a note from expressly reserving his rights against an indorser when he delays the enforcement of its collection. In the present case payment of the note at maturity could not be enforced against the telephone company, the drawer, by reason of its bankruptcy. With each subsequent renewal note there was an agreement on the part of the receivers in writing that it and any renewals or substitutions should not be taken or considered as a payment of the original note but simply as additional and collateral security for the debt represented by the original note, which was to continue in the possession of the bank and to be held by it as effectually as though the additional note had not been given or accepted. These stipulations and other evidence of the intention of the parties that the rights of the holder of the note in suit against the indorsers should be preserved was amply sufficient to sustain the finding of the jury, if it would not have justified the court in so holding as a matter of law under the undisputed evidence.

11. Renunciation of Rights.

Whitcomb v. The National Exchange Bank of Baltimore.
123 Md. 612.

The Bank sues Whitcomb upon his indorsement of a note of the Roxbury Distilling Company. Whitcomb defends on the ground that he had rendered legal services to the Distilling Company at the instance of the Bank, the holder of the note, which by its president had orally agreed that he should be released from further liability on his indorsement.

Held, that an oral renunciation of rights against a party is not binding.

Urner, J.

The Negotiable Instruments Act provides by Section 141 as follows: "The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." In view of this provision the court below declined to submit for determination as an issue of fact the question whether there had been an oral agreement for the release of the defendant as an indorser of the promissory note in suit.

The theory advanced by the defendant is that the provision we have quoted from the Negotiable Instruments Act applies only to renunciation made without consideration, and that it has no reference to releases of liability under agreements which operate by way of accord and satisfaction. In view of the general policy of the statute we are unwilling to restrict its application by adopting the construction suggested. Assuming that the transaction described by the defendant, and upon which he relies, would furnish a sufficient basis for an accord and satisfaction with respect to his liability as an indorser, we are of the opinion that under the plain and comprehensive language of the Act the only mode of proving the alleged release is by a renunciation in writing. Undoubtedly the word "renunciation," as used in the section quoted, appropriately describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration. It is defined as meaning: "The act of renouncing or giving up something possessed," "The act of giving up a right," "The legal act by which a person abandons a right acquired, but without transferring it to another." These definitions are practically the same as those given in the same authorities for the word "release." Both the terms thus similarly defined are classed as synonyms of "relinquishment." There can be no doubt that the word we are interpreting is sufficiently broad in its meaning to include the release of a claim by virtue of an accord and satisfaction as well as a waiver of liability, made gratuitously. If we were to accept the defendant's theory, it is evident that the result would be to restrict the term to a portion only of the transactions to which it is capable of being applied.

We see no occasion to thus narrow its effect, and there is cogent reason for duly regarding its plain and comprehensive significance. The statute in which it is used was enacted upon the recommendation of the Commission representing Maryland in the movement to promote uniformity of legislation. The same measure has been adopted as a part of the statutory law of a number of the states of the Union. The primary purpose of its enactment was to secure uniformity in the law governing negotiable instruments. In order that this object

may be realized it is important that differences of judicial construction as to its application should be avoided so far as may be reasonably practicable. This end can best be obtained by allowing to the language of the statute the full effect to which it is legitimately entitled. The surest means of producing an opposite tendency would be the attempt to introduce possible but unnecessary distinctions and qualifications for the purpose of restricting the scope and meaning of the terms employed in this well considered legislation.

12. Transfer After Payment By Party Secondarily Liable.

Lill v. Gleason. 92 Kas. 754.

Gleason made a note to the Peerless Company for the purchase of stock in the corporation, under a contract whereby he might cancel his agreement to purchase upon notice to the Company. The Company secured the indorsement of Lill as accommodation indorser, and discounted the note with the bank. Gleason gave notice of his intention to cancel his contract for the stock, but the note was not returned. Lill paid the note upon non-payment by Gleason and the Company at maturity, and now sues Gleason thereon.

Held, that while Lill did not acquire rights against Gleason as an accommodation party who had paid the note, he did acquire rights as an assignee of the bank's title.

Burch, J.

The note, having been indorsed by the payee in blank, became payable to bearer and negotiable by delivery. When it was delivered by the bank to Lill he became the bearer and holder. Having derived title from the bank, which was a holder in due course, and not having been a party to any fraud or illegality affecting the instrument, Lill became possessed of all the rights of the bank against the maker. It made no difference that the paper was overdue and unpaid, and would have made no difference if it had been shown that when he acquired title Lill had learned of the contract between Gleason and the supply company, to which, as between them, the note was subject. The negotiable instruments law merely affirms the settled principle of the law merchant that when a negotiable instrument once passes into the hands of a holder by indorsement in due course the maker's right to interpose defenses good against the payee is cut off as to all subsequent holders not parties to fraud or illegality affecting the instrument. The reason is that if the holder in due course could not invest his transferee with his own capacity to recover on the paper his property rights would be materially and prejudicially reduced.

Section 128 of the negotiable instruments law reads as follows: "Where the instrument is paid by a party secondarily liable

thereon it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, except: (1) Where it is payable to the order of a third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated."

It is plain that the expression "remitted to his former rights" does not apply to Lill. He was a party secondarily liable who paid the instrument, but he had no former rights to which he might be remitted. After the payee had indorsed the note Lill indorsed it to accommodate the payee in disposing of it to the bank. Standing in that situation Lill had no title to the note or claim on either the maker or the payee. After he paid the note he had a right of some kind against somebody—the right to reimbursement from the party accommodated, the right to enforce the note against the defaulting maker, or both—but until he paid the note no obligation arose in his favor on the part of anybody, and of course the statute did not remit him to a situation in which he was entirely remediless. The words "remitted to his former rights" must therefore be restricted in their application to a party secondarily liable who has himself been connected with the title to the instrument.

Manifestly, this section refers only to indorsers for value and not for mere accommodation. An indorser for value at some time prior to his indorsement owned the note with the right to sue upon it at maturity. With this right he parted when he discounted the paper by indorsement to a purchaser for value, who in turn by like process may transfer the title, becoming liable by his indorsement to the new indorsee, and so on without limit until the maturity of the instrument. Then, whichever of the successive indorsers is compelled to pay is restored to his former rights within the meaning of this section, upon striking out his own and subsequent indorsements.

"The case is entirely different, in reason, concerning an accommodation indorser or a guarantor. Neither of them has any 'former rights,' nor, indeed, any right whatever, until he pays the note or bill."

V.

BILLS OF EXCHANGE AND CHECKS.

Some special rules are in effect regarding bills of exchange, which may be defined as unconditional orders in writing, addressed by one person to another, signed by the person drawing the bill, requesting the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.

Such a bill is negotiable before, as well as after, it is presented to the drawee for acceptance. The drawee is not liable unless he accepts with or without qualification. He may accept generally, or by a qualified, conditional, or partial acceptance. If he does not accept generally, the holder may treat the bill as dishonored. Presentment for acceptance is required when the instrument so provides, when necessary to fix the time of maturity of the instrument, and when the instrument is payable elsewhere than at the drawee's residence or place of business. In these cases, the holder must either present or negotiate the instrument within a reasonable time or, in the absence of excuse, persons secondarily liable will be discharged. Presentment for acceptance must be made in much the same way as presentment of a note and is excused on much the same terms.

When a foreign bill of exchange is not accepted, it must be protested. The protest must be annexed to the bill, specifying the time and place of presentment, the fact that presentment was made, the nature thereof, the cause of protest, the demand and the answer given. Protest may be by a notary public, or by any respectable resident in the presence of two or more creditable witnesses. Protest must be made on the day of dishonor, unless excused under the rules excusing presentment.

When a bill of exchange has been protested, any person not a party already liable on the bill may intervene and accept the bill generally or partially for the honor of any party liable thereon. This acceptance must be made in writing and state the fact that it is for honor. The acceptor for honor engages that he will on presentment pay the bill according to the terms of his acceptance, provided that it shall not have been paid by the drawee, and provided that it shall have been presented and protested and notice shall have been sent to him at maturity.

A check is a bill of exchange drawn on a bank, payable on demand. The law relative to checks is, in the main, the same as that regarding bills of exchange. A check must, however, be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

When a check is certified by the bank on which it is drawn, the certification is equivalent to acceptance. When the holder of a check has it certified, the drawer and all indorsers are discharged from liability. When the drawer has the check certified, on the other hand, his liability is the same as that of the drawer of a bill, i. e., he is secondarily liable. A check does not operate as the assignment of any part of the fund to the credit of the drawer at the bank, and the bank is not liable to the holder unless and until it accepts and certifies the check.

A bank is liable upon a forged check which it pays, unless the drawer of the check is estopped to deny his own liability on account of negligence contributing to the forgery. This principle rests upon the theory that a check is an order directed by the drawer to the bank to pay funds belonging to him to the order of the drawee, and that when the bank has been misled by a forgery, no such order has been given. This defense is really the same as that open in the case of any negotiable instrument when it is apparent that the instrument sued upon is not in any sense a contractual liability of the defendant. When, however, the drawer of the check has by his conduct justified the bank in assuming that it is proper to pay the person who negotiates or cashes the check, this principle does not apply and the amount paid may be charged to the account of the drawer.

A. Bills of Exchange.

1. Acceptance in General.

The National Park Bank v. Saitta. 127 App. Div. (N. Y.) 624.

Mauro drew a draft upon the defendant, a banker at Genoa, Italy, which he accepted. Later, the draft was indorsed to the plaintiff bank, which sues upon it. The defense is that the acceptance was without consideration.

Held, that the acceptor of a negotiable instrument cannot plead lack of consideration for the acceptance.

Clarke, J.

The final point to be considered is the defense of failure of consideration. The Negotiable Instruments Law provides in section 50: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value." When this defendant accepted this bill he, therefore, was presumed to have accepted it for a valuable consideration. Section 221 provides that "the holder of a bill, presenting the same for acceptance, may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored." This provision is not confined to sight bills, but seems to be applicable to all bills of exchange. Consequently, if the bank in Genoa had presented the bill to the defendant for acceptance, although the date of payment was fixed, and the drawee had refused to accept it, the plaintiff would have been entitled to treat the bill as dishonored, and would have acquired the immediate right to call on the other parties to the bill.

Section 246 of the act provides: "A bill is dishonored by non-

acceptance when it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers." Section 248: "When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary."

Although when such a bill is made payable at a day certain at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection. A bill payable at a fixed period from its date may be presented for acceptance at any time.

It is settled that as between remote parties to a bill of exchange, as the payee or indorsee and the acceptor, in order to sustain the defense of no consideration, two considerations at least must come in question: First, that which the defendant received for his liability; and secondly, that which the plaintiff gave for his title. "An action between remote parties will not fail unless there be absence or failure of both of these considerations. It is immaterial when an acceptance is made; it may be made at any time and the rights of the payee and of the indorsees are the same after it is made whether they were acquired in anticipation of it or subsequent to it. Where, as in the case at bar, there is an acceptance upon the bill it makes no difference in the rights of payees or indorsees whether they became such before or after the acceptance. The instrument is negotiable before acceptance and the acceptance is an acknowledgment of the debt it represents, and an absolute promise to pay it to the person who is or shall become the holder of the bill; and to allow a want of consideration for the acceptance to defeat the right of a bona fide holder, whether he became such before or after the acceptance, would be contrary to the nature and purpose of bills of exchange and to the uniform usage in regard to them."

As it is conceded that the plaintiff was the bona fide holder for value of the bill in question, the foregoing statutory provisions and authorities conclusively establish that the defendant failed in his defense of want of consideration flowing to him for his acceptance.

2. Qualified Acceptance.

Lewis, Hubbard & Co. v. Morton. 80 W. Va. 137.

Morton & Company drew the following draft to the order of Lewis, Hubbard & Company:

“\$165.49

West Virginia Timber Co.,
Charleston, W. Va.

Please pay to the order of Lewis, Hubbard & Co., One Hundred sixty five & 49/100 Dollars and charge to our acct.

J. J. Morton & Co.,
By J. J. Morton.”

The West Virginia Timber Company conditionally accepted the order as follows: “This order will be paid whenever the lumber is inspected and placed to the credit of J. J. Morton & Co.

West Virginia Timber Co.,
G. E. Breece, President.”

The Timber Company did not pay the order and Lewis, Hubbard & Company sue the drawers. The defense is to the effect that the drawers were not advised of the conditional acceptance and that therefore the payee is bound by its terms.

Held, that upon a conditional acceptance the payee is entitled to notify the drawer of dishonor; but if he does not do so, he will be bound by the conditional acceptance.

Williams, J.

The contention that the paper is not a bill of exchange, cannot be sustained. It fills the description of such instrument in every material respect. Sec. 126, Ch. 98A, Code, defines a bill of exchange to be “an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed, determinable future time, a sum certain in money to order or to bearer.” This definition is but declaratory of the law merchant. “A bill of exchange is defined as an open letter of request from and order by one person on another, to pay a sum of money therein mentioned to a third person at a specified time absolutely and at all events.” We have already seen that the absence of a date or time of payment is not material.

The acceptance being qualified, the drawers were entitled to reasonable notice thereof, and there is no pretense that they were ever notified, nor that they ever either expressly or impliedly authorized such acceptance, or thereafter assented to it. They knew nothing of it, and, after the lapse of a reasonable time after the bill was issued, were justified in assuming it had been paid. There had been no settlement of the lumber account between defendants and the West Virginia Timber Company, and their lumber dealings were such as justified defendants in believing there was enough due them to pay the order. They were, therefore, entitled to notice, within a reasonable time, of the qualified acceptance, and plaintiff's failure to give them such notice discharged them from liability. The relation of acceptor and drawer is that of principal and surety, or

of maker and indorser of a negotiable note. After acceptance the drawer is not primarily liable, and the [payee], or holder, of such paper is bound to exercise reasonable diligence to collect from the acceptor, on pain of losing his remedy against the drawer. The [payee] had a right to treat the qualified acceptance as a dishonor. It did not do so, and left the bill in the possession of the acceptor after acceptance, together with the note, marked paid, for the discharge of which the bill had been issued, and apparently forgot all about the transaction, until shortly before the institution of this suit a discrepancy was discovered in the accounts between the [payee] and acceptor. The negotiable instruments statute itself determines the question. Sec. 142 of that statute provides: "where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto." Having failed to give defendants notice of the qualified acceptance, plaintiff has lost its right of recourse on the drawers. Its position is not different from what it would have been if the bill had been dishonored and defendants had received no notice of the dishonor.

3. Conditional Acceptance.

Stevens v. Androscoggin Water Power Co. 62 Me. 498.

Hibbard drew an order upon the Power Company in favor of Stevens, which was accepted by the Power Company in a separate letter as follows:

"Lisbon Falls, Me., March 18, 1873.

Mr. James A. Stevens,

Dear Sir: Yours of thirteenth inst., is received. We shall not pay any orders of Mr. Hibbard until we settle with him. If there is anything over, I will keep it back for the purpose.

Yours truly,

E. Plummer, Agent."

Later, the Power Company settled with Hibbard, and Stevens sues upon the acceptance.

Held, that a conditional acceptor is liable in accordance with the terms of the condition.

Appleton, C. J.

An acceptance may be absolute or conditional. A conditional acceptance at once becomes absolute upon the performance or happening of the condition.

In the present case the defendants' promise is to pay if in settlement "there is anything over." When the acceptance is conditional, the holder may accept or refuse the offer. The plaintiff acceded to the proposition of the defendants—permitted the order

to remain with them, and did not sue out a trustee writ, by which his whole debt would have been secured. There was a settlement and the amount due exceeded the amount of Hibbard's order. The defendants then became liable, and this liability, conditional in the first instance, accrued long before the trustee suit of Bean. The payment to Bean by the defendants was in their own wrong, and cannot defeat the prior right of the plaintiff.

4. Protest.

Dennistoun & Company v. Stewart. 17 How. (U. S.) 606.

Stewart drew a foreign bill of exchange on Booth to the order of himself. It was accepted for Booth by Byrne, an authorized agent, and then indorsed to Dennistoun & Company. Upon maturity, the bill was not paid and the plaintiff sues Stewart as drawer. Stewart asserts that Byrne's name was incorrectly set forth in the protest.

Held, that an immaterial error in the form of protest does not release the drawer.

Grier, J.

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form "a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is, therefore, protested."

A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed verbatim.

However stringent the law concerning mercantile paper, with regard to protest, demand, and notice, may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust, or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made.

The copy of the bill is connected with the instrument certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original. Mercantile paper is generally brief, and without the verbiage which extends and enlarges more formal legal instruments. Hence, it is much easier to give a literal copy of such bills, than to attempt to identify them by any abbreviation or description. The amount, the date, the parties, and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters, or even words, when the substance is retained, cannot and ought not to vitiate the pro-

test. A lost bill may be protested, when the notary has been furnished with a sufficient description, as to date, amount, parties, etc., to identify it.

We are of opinion, therefore, that the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court.

5. Acceptance for Honor.

Hoare v. Cazenove. 16 East (Eng.) 391.

Hanbury, at Hamburg, drew a draft upon Penn & Hanbury of London in favor of Balleydier & Company. Penn & Hanbury did not accept the draft and Cazenove accepted it for the honor of the first indorser, Balleydier & Company, whose agent he was. The plaintiff, the holder, sues Cazenove upon his acceptance. The defense is to the effect that the draft was not again presented to the drawee at maturity.

Held, that an acceptor for honor is not liable unless presentment is made at maturity to the drawee.

Lord Ellenborough, C. J.

The question therefore is, whether a presentment to Penn & Hanbury, the drawees, for payment, and a protest for non-payment by them, is, or is not essential as a previous requisite to maintaining an action against these defendants, the acceptors for the honour of the first indorsers; and this depends upon the nature and obligation of an acceptance for the honour of the drawer or indorser. If an acceptance in these terms be an engagement by the person giving it that he will pay the bill when it becomes due, and entitles the holder to look to him in the first instance, without a previous resort to any person, the plaintiffs are in that case entitled to recover upon their second count: but if such an acceptance be in its nature qualified, and amount to a collateral engagement only, i.e., an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonouring this bill, and such dishonour by him should be notified, by protest, to the person who has accepted for the honour of the indorser, then the necessary steps have not been taken upon this bill, and the plaintiffs cannot recover. And such, after much consideration, we are of opinion is the case.

The use and convenience, and indeed the necessity of a protest upon foreign bills of exchange, in order to prove in many cases the regularity of the proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have required it. And indeed the reason of the thing, as well as

the strict law of the case, seems to render a second resort to the drawee proper, when the unaccepted bill still remains with the holder; for effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again when the period of payment had arrived. And the drawer is entitled to the chance of benefit to arise from such second demand, or at any rate to the benefit of that evidence which the protest affords, that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort.

6. Payment for Honor.

Wood v. Pugh, Gano & Lee. 7 Oh. 501.

Bell, in Cincinnati, drew a draft in favor of Pugh, Gano & Lee on Willis & Robinson, in New York. The payees, the defendants, sold this draft to a bank in Cincinnati, which forwarded it to New York where it was accepted but not paid at maturity. The plaintiff, who had commercial dealings with Bell and was acquainted with Willis & Robinson, paid the amount *supra* protest for the honor of the defendants as indorsers. This suit is brought to recover the amount so paid. The defense is that no notice of payment for their honor was sent to the defendants.

Held, that a party who has paid a bill for the honor of an indorser must give notice of his intervention for honor.

Wood, J.

The right of one individual to make another his debtor, by volunteering to disturb rights legally fixed, upon debts due, is confined to this special case of paying a bill *supra* protest, for the honor of the drawer or indorser. The proceeding has grown up with the law merchant, and we have not attempted to look after its commencement. The elementary writers treat such payer as acquiring an original right in himself against the persons for whose honor he pays, and upon the right thus acquired, he is invested with the rights of the person for whose honor he paid, in relation to other parties to the protested paper. But he acquires no new rights against any one.

Payment for the honor of the indorser binds such indorser to refund the amount paid, upon which he is reinvested with all his original rights, which, until such payment is made, are held by the payer. It would seem but reasonable that prompt notice should, in such cases, be given to a party upon whom, without his knowledge or consent, these new relations are imposed. The change may very seriously affect his interests: for it might be that every other party to the bill were his debtors, and bankrupts, so that this payment for honor subjects him to a total loss that could not otherwise

payable on demand, bankers and business men are left without any definite rule by which to govern their action in a matter where simplicity and precision of rule are especially desirable.

2. Check Not An Assignment of Funds.

Van Buskirk v. State Bank of Rocky Ford. 35 Col. 142.

A check drawn on Van Buskirk's bank by one of its depositors was presented for payment to the State Bank by the payee. The Bank telephoned Van Buskirk, asking if the check was good, and received a reply in the affirmative. The Bank then paid the check. Payment upon it was stopped a few minutes later by the drawer, of which fact Van Buskirk advised the Bank. Van Buskirk refused to pay the check, and this suit is brought to compel payment.

Held, that a bank is not liable upon a check until it has accepted it in writing.

Campbell, J.

Regardless of the common law rights of the parties under the facts of this case, we think there can be no doubt as to the correctness of appellant's leading contention that, under our negotiable instrument law, the drawee of a check is not liable to the holder unless and until he accepts or promises to pay the same, and such assent to his liability must be in writing. Section 126 of our act defines a bill of exchange as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Section 185 reads: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

At the common law a bill of exchange payable on demand need not be presented for acceptance. Indeed, strictly speaking, there is no such thing as acceptance of a check in the ordinary sense of the term; yet by consent of the holder the drawee bank may enter into an engagement quite similar to that of acceptance by certifying the check to be good, instead of paying it. A check is a species of bill of exchange, viz., that particular kind of a bill which is drawn on a bank and payable on demand. Under our act it need not be presented for acceptance unless it contains an express stipulation to that effect.

Before the passage of our negotiable instrument law this court had ruled, in accordance with the weight of authority, that a right of action does not exist in favor of the holder of a check against the drawee bank where there has been by the latter no acceptance or promise to pay. Our statute has expressly so enacted. The same

cases at least tacitly recognized the doctrine that such acceptance or implied promise might, in the absence of a statute to the contrary, be proved by parol testimony, but this doctrine is abrogated by our statute, as we proceed to show. According to this statute, though all bills of exchange are not checks, yet as a check is therein expressly said to be a bill of exchange drawn on a bank and payable on demand, every check is a bill, that is, it is a species of a bill. So that, though a check need not be presented for acceptance in order to render the parties thereto liable, still as the check itself does not operate as an assignment of any part of the fund to the credit of the drawer with the bank, and the drawee bank is not liable to the holder, unless and until it accepts or certifies the check, and as except as in the act otherwise provided all of its provisions applicable to a bill of exchange payable on demand apply to a check, and as no contrary provision for the acceptance of or promise to pay a check has been made, the provision applicable to a bill of exchange that acceptance or certification when made must be in writing applies also to a check. There being no pretense in this case that the promise to pay or certification or acceptance of the check sued upon was in writing, the holder was not entitled to sue the bank upon it.

3. Acceptance by Conduct.

Wisner v. The First National Bank of Gallitzin. 220 Pa. 21.

The plaintiff, the holder of certain checks, sues the bank upon them, claiming that the bank had accepted them by its failure to return them within 24 hours after their receipt. It appeared that the bank handed the checks to a notary public, who held them without protesting them or giving notice of dishonor, so that they were not returned to the bank for more than 24 hours, nor to the plaintiff for some time thereafter.

Held, that under the Negotiable Instruments Act, a drawee is liable as acceptor upon a bill of exchange which it fails to return within 24 hours.

Mestrezat, J.

The drawee to whom a bill is delivered for acceptance is deemed or taken to have accepted it under the act: (a) where he destroys it, (b) where he refuses within twenty four hours after delivery to return the bill accepted or nonaccepted to the holder, and (c) where he refuses within such other period as the holder may allow to return the bill accepted or nonaccepted to the holder. When either of these conditions exists, the drawee becomes an acceptor of the bill and assumes liability as such. An implied or a verbal acceptance of a bill is abolished by the act, and there are now only two modes of accepting a bill: (1) By writing, signed by the

drawee, and (2) by a nonreturn of the bill which is declared by the section under consideration to be the equivalent of an acceptance.

The manifest purpose in requiring the prompt return of the bill is in the interest of and for the protection of the holder. It is immaterial to the drawer when the bill is returned, as he is protected by notice of dishonor, and hence this section of the act requiring prompt action in returning the bill, was obviously enacted for the benefit of the holder of the bill. The act declares that twenty four hours is sufficient time for the drawee to decide whether or not he will accept the bill, and the section under consideration, having allowed this time, requires him to return the bill accepted or nonaccepted. If a demand and refusal are conditions precedent to an acceptance under this section, then the holder must not only present the bill for acceptance, but he must make a demand for its acceptance and await a specific refusal before the drawee is deemed an acceptor. This would certainly not be to the convenience or the interest of the holder, but in direct opposition to both. It would afford the holder less protection and would in effect prevent the return of the bill within twenty four hours; or it would require the holder in transmitting the bill with instructions to present it for acceptance to send at the same time a demand for its acceptance. It is obvious that such demand accompanying a presentation of a bill for acceptance is wholly unnecessary, and certainly was not in contemplation of the legislature in enacting the section.

The presentation of a bill for acceptance is a demand for its acceptance which, if the bill is retained by the drawee, implies a demand for its return if acceptance is declined, in contemplation of the negotiable instruments law. The purpose of presenting a bill of exchange to the drawee is to require him to accept and assume liability for its payment, or to refuse its acceptance and thereby avoid liability. When the bill is presented, action by the drawee is, therefore, demanded of him, and he cannot remain silent and inactive without incurring the statutory penalty prescribed for such conduct. If the section has in view the protection of the holder, as it manifestly has, then it was evidently the intention of the legislature that the nonreturn of the bill within the specified time, regardless of the cause, will make the drawee an acceptor.

4. Acceptance of Postdated Check.

Swenson Brothers Co. v. Commercial State Bank. 98 Neb. 702.

The Swenson Brothers Company was the holder of postdated checks of the Shilton Trading Company, which the Bank by its president agreed in writing to accept when they became due. The Bank failed to pay them, and the plaintiff sues the Bank upon its acceptance.

Held, that a bank is not bound by the unauthorized acceptance, by an officer, of a postdated check.

Sedgwick, J.

There are authorities that hold that the acceptance of a check by a bank when there are no funds of the maker in the bank is void, the president of the bank having no authority to make such acceptance. These authorities make exception to the rule when the payee of the check parts with property on the faith of the acceptance, and is without notice that the maker of the check has no money on deposit in the bank subject to check at that time. Where a postdated check is certified by the cashier of the bank on which it is drawn, to be "good" by indorsement thereon, before the day of its date, the instrument, upon its very face, communicates facts and information to persons receiving the same that the cashier, in making such certification, was not acting within the known limits of his power, and that he was clearly exceeding them. This principle is decisive of this case. This transaction was not ordinary banking business.

These checks were not presented for certification and retained by the payee. They were delivered to the bank. The acceptance, therefore, does not bind the acceptor in favor of this plaintiff, who did not receive the checks for value on the faith of the acceptance. The president of the bank undertook to guarantee that the checks would be made good by the maker thereof, and that the bank would pay the amount to the payee of the check. The payee not only had notice of this, but participated in this arrangement, and was bound to know that such a transaction was beyond the power and authority of the president of the bank.

5. Effect of Delay in Presentment of Check.

Rosenbaum v. Hazard. 233 Pa. 206.

Rosenbaum sues Hazard, the drawer of a check made to the order of Sparhawk and indorsed by him to Rosenbaum. The check was not presented nor was suit brought upon it until shortly before the expiration of the statute of limitations. The defendant insists that the delay in presentment releases him from liability.

Held, that delay in presenting a check does not release the drawer from liability unless he has suffered by the delay.

Potter, J.

The Negotiable Instruments Act provides in sec. 186, "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." The fair inference to be drawn from this language is that, if the drawer has suffered no loss by the delay, he will not be discharged. This provision is declaratory of the general rule. The want of due presentment of a

check does not discharge the drawer, unless he has suffered some loss or injury thereby; this is one point of difference between a check and a bill of exchange. The only way in which the drawer of a check would be liable to be injured by a failure to present it within a reasonable time is where subsequent to its delivery and prior to its presentment the bank upon which it is drawn becomes insolvent. In such a case, in respect to the check, the drawer will be discharged to the extent of the loss he has sustained thereby. If a bank or banker still remains in good credit, and is able to pay the check, the drawer will still remain liable to pay the same, notwithstanding many months may have elapsed since the date of the check, and before the presentment for payment and notice of the dishonor. So, if the drawer, at the date of the check or at the time of the presentment of it for payment, had no funds in the bank or banker's hands, or if, after drawing the check and before its presentment for payment and dishonor, he had withdrawn his funds, the drawer would remain liable to pay the check, notwithstanding the lapse of time. To an action by a holder against the drawer of a check, it is no answer that the check was not presented in reasonable time, unless, during the delay the fund has been lost by failure of the banker.

6. Effect of Certification.

Times Square Automobile Company v. Rutherford National Bank. 77 N. J. L. 649.

Purdy bought a car of the Automobile Company, giving for it a check to the order of Ashton, an automobile salesman. Ashton indorsed the check to the Automobile Company, which immediately had it certified. When the check was presented for payment, the bank refused to honor it on the ground that Purdy had justifiably stopped payment. The Automobile Company sues on the contract of certification.

Held, that certification of a check at the request of the holder discharges the drawer and makes the certifying bank responsible to the holder.

Gummere, C. J.

The effect of the certification of a check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. When a check is presented by the drawer for certification, the bank knows that it has not yet been negotiated, and that the drawer wishes the obligation of the bank to pay it to the holder, when it is negotiated, in addition to his own obligation. A certification under such circumstances does not operate to discharge the drawer, and so long as the drawer remains undischarged, such a defense as that set up in the present case is

open both to him and to the bank. But when the certification by the bank is done at the request of the holder the effect is radically different. The transaction, then, is virtually this: The bank says, "That check is good; we have the money of the drawer here ready to pay it; we will pay it now if you will receive it." The holder says, "No, I will not take the money now, you may retain it for me until the check is presented for payment." The bank replies, "Very well, we will do so." The result is to discharge the drawer from any further liability on the check, and to substitute a new contract between the holder and the bank by the terms of which the money called for by the check is transferred from the account of the drawer to the account of the holder. In contemplation of law the obligation of the bank to the holder, when the certification is at his request, is the same as if the funds had been actually paid out by the bank to him, by him redeposited to his own credit, and a certificate of deposit issued to him therefor.

The defendant, in refusing payment of Purdy's check, apparently considered that its obligation to the holder was no greater than if its certification had been made at Purdy's request. It failed to realize that its act operated as a payment of the check, so far as Purdy was concerned, and transferred the moneys which it called for to the account of the plaintiff. The situation was the same, so far as the defendant was concerned, as if Purdy had paid cash to the plaintiff for the car which he had purchased, and the plaintiff had then deposited the cash in the defendant's bank. Having accepted the plaintiff's money, and issued to him a certificate of deposit therefor, it did not concern the defendant from whom, or how, or under what circumstances the money had been obtained. Its contract required it to pay the amount of the deposit to the plaintiff, or its order, and it could not avoid its obligation to do so by showing that the plaintiff had fraudulently obtained the money which it had deposited with the defendant.

7. Effect of Alteration of Check.

London Joint Stock Bank, Limited v. Macmillan and Arthur.
(1918) A. C. (Eng.) 777.

Klantschi, the cashier of Macmillan and Arthur, brought to one of the partners a check for him to sign for petty cash. The check was at that time made out for £2 but no words were inserted in the space left for writing. Klantschi afterwards raised the check to £120, which the bank paid. Macmillan and Arthur claim that the bank was not entitled to debit their account more than the £2 for which the check was originally drawn.

Held, that when alteration of a check has been made possible by the negligence of the drawer, a bank paying the check may charge the full amount to the customer's account.

Lord Shaw of Dunfermline:

It is the case of a customer drawing a cheque in his own favour from his banker. There is no complication as to the cheque having passed to a payee, third party, nor is there any question, accordingly, as to any conduct or misconduct on the part of such payee. The case is direct in that sense. Nor is there any question of the genuineness of the signature; it is admitted to be genuine. I state this elementary point because it disposes of a considerable portion of the authorities cited to us in regard to forged cheques. A cheque with the signature of a customer forged is not the customer's mandate or order to pay. With regard to that cheque it does not fall within the relation of banker and customer. If the bank honours such a document not proceeding from its customer, it cannot make the customer answerable for the signature and issue of a document which he did not sign or issue; the banker paying accordingly has paid without authority and cannot charge the payment against a person who was a stranger to the transaction.

The case, then, must be taken as the simplest one, namely, of a cheque duly signed, forwarded on behalf of the customer to the banker, and honoured. There are in these circumstances reciprocal obligations. If the cheque do not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and *ex facie* valid cheque are serious and obvious. In the second place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with, then that in the usual case is met by the marking "refer to drawer," and by a delay in payment until that reference clears away the doubt. Always granted that the doubt was reasonable, the refusal to pay is warranted. These obligations on the banker do not, of course, exist until after the cheque has been presented.

Upon the other part there are obligations resting upon the customer. In the first place his cheque must be unambiguous and must be *ex facie* in such a condition as not to arouse any reasonable suspicion. But it follows from that that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care to frame and fill up his cheque in such a manner that when it passes out of his, the customer's, hands it will not be so left that before presentation, alterations, interpolations, etc., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognizable by law. The consequences of such negligence fall alone upon the party guilty of it, namely, the customer.

It appears to me that a crucial consideration in a case such

as the present is this, namely, what is the point of time at which these respective obligations meet. The point of time is the presentation of the cheque. Not until that moment is the banker confronted with any mandate or order, and in my opinion the responsibility for the cheque and all that has happened to it between its signature and its presentation is not, and ought not to be, laid upon the banker. If at that moment three things are satisfied—namely, (1) that the cheque is duly signed, (2) that its appearance and statement of contents present no reasonable ground for suspicion, and (3) there are customer's funds available—then the banker is bound to pay. But if a banker were bound to inquire in regard to every cheque with a genuine signature what had been the history of that cheque from the time that the customer lifted his pen from it until the time when it was presented at the bank, banking business would be greatly impeded or impossible; and in my humble view it would be subjected to risks for which there is no foundation in legal principle.

[This] is a case of negligence.

The negligence consists in the breach of a duty owing by the customer to the banker. That duty is so to fill up his cheque as that when it leaves his hands a signed document it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant it to cover shall be prevented.

8. Effect of Forged Check.

People's Bank v. Franklin Bank. 88 Tenn. 299.

Young's name was forged to a check drawn on the People's Bank, payable to the name of Morgan, whose name was also forged as indorser. The check was presented to the Franklin Bank and cashed without satisfactory evidence of the identity of the person who cashed it. The People's Bank paid the Franklin Bank the amount of the check and now seeks to recover the sum so paid.

Held, that a bank which has negligently cashed a forged check is liable to the bank upon whom it is drawn for the amount paid.

Folkes, J.

The general rule undoubtedly is, that the bank has, at its peril, to know the genuineness of the signature of its depositor; and if it pays a forged check, the loss must fall upon the bank and not upon the depositor, except in cases where the negligence of the depositor has induced or brought about the payment by the bank. This duty, with reference to the bank, may be said to be an exception to the general rule that money paid by mistake can be recovered, and to the general statement of another equally well

settled rule that the payment of a forged paper conveys no title; for it is well settled that the deposit of a forged bill or base coin creates no indebtedness, although credited to the depositor's account, for the reason that payment in such material could not discharge a debt and cannot create one. The bank is not only responsible to the depositor where the check with the depositor's signature forged is paid by the bank (except where the depositor has been guilty of negligence sufficient to mislead the bank), but the bank is precluded from recovering from a party to whom the forged check has been paid, where such party, being without fault, would be prejudiced by being required to refund to the bank, upon whom rests the duty of determining the genuineness of the depositor's signature. Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and of the text-books leads us to the conclusion that the bank can recover of a party to whom payment is made on a forged check, indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check; for, notwithstanding the negligence to some degree that the paying bank has been guilty of, in paying the forged check without detecting the forgery of its depositor's signature, it often happens, or may happen, that the party to whom payment is made has been guilty of the first negligence in purchasing and indorsing the forged paper. The bank upon whom the check is drawn, in the practical administration of banking business, may well be lulled to a less careful scrutiny of its depositor's signature of a check where the same is indorsed by another bank with which it is in correspondence or interchange of business, than it would exercise in accepting and paying the same check, not so indorsed, to a stranger. The indorsement of the check by the payee may be said, ordinarily, to be a guarantee of the genuineness of the indorsements theretofore on the paper, and also of the genuineness of the drawer's signature, subject perhaps, to some exception in particular cases, as, for instance, where the indorsement is made after the genuineness of the preceding signatures has been approved by the paying bank. Applying these principles to the case at bar, we are of opinion, and so adjudged, that the first fault was with the defendant bank. This bank accepted and cashed a check drawn on a bank in another county, to which the name of the drawer and the payee had both been forged, and, so far as this record discloses, without requiring any identification of the parties to whom such payment was made; certainly without reserving any evidence of the identity of such parties for the benefit of itself or of others who might be injured by such forgery. The complainant bank, upon receiving such check in due course of mail for deposit to credit of defendant, might well rely upon the exercise of due prudence and diligence on the part of its depositor, the defendant bank, and might well regard the latter's indorsement of the check as significant of the fact that such prudence had been exercised, and, if not, that the indorsement would stand as a guarantee to the paying bank from loss

that might otherwise fall upon it by reason of its passing the amount of the check to the credit of such indorser. Such would not only seem to be sound in theory and supported by authority, but is in accordance with the proof in this case; and it is a matter of such general information that perhaps the court might be warranted in taking judicial knowledge of it; that in dealings between banks, and especially with reference to clearings and clearing-houses, banks will adjust and pay differences between each other or between themselves and the clearing-house, upon the faith of the indorsement by other banks of the checks involved in such settlement before they examine the signature to the checks involved or embraced in the settlement, relying on such indorsements as protecting them in such payment should a subsequent and more careful scrutiny of the signatures disclose forgeries in the making and indorsing of the checks so paid.

9. Estoppel to Assert Forgery.

Hoffman v. The American Exchange National Bank. 2 Neb. (Unoff.) 217.

Hoffman sent a check to the order of Brubaker as his share of an estate. The person who received the check was not Brubaker at all, but an impostor who lived at a distance, and who had given satisfactory proof of his identity as Brubaker to Hoffman. Hoffman sues the bank for payment of the check to a person not rightfully entitled to it.

Held, that a bank is not liable for the payment of a check on which the indorsement is forged, if payment is made to the party to whom the drawer intended it should be made.

Hastings, C.

It is claimed that this signature is a forgery, and the defendant therefore liable. There seems to be no doubt that the real Peter W. Brubaker who was among the heirs of this estate never indorsed this draft. But it also seems clear that the plaintiff is not entitled to set up this claim. The weight of authority seems to be decidedly in favor of the doctrine that where a check or draft is drawn or indorsed and delivered to a party to be cashed by him under the name in which it is made out or indorsed, that his signature by way of indorsement in that name is valid as between an innocent holder and the party delivering it to him. This is commonly put on the ground that the payer of the draft or the purchaser of it is simply carrying out innocently the intention of the maker or indorser. It is also placed sometimes as was done in a measure in this instance by the trial court, on the ground of negligence on the part of the maker. It is sometimes held that the payee is a fictitious person and the check or draft therefore payable to bearer.

It is suggested in defendant's brief that the exemption from liability is more properly placed on the ground of estoppel or, as it is stated in the negotiable instruments act, that the party is "precluded from setting up the forgery or want of authority." It certainly would seem that in this case when Mr. Hoffman was satisfied with the release he got and mailed the draft to the maker of that release he asserted as definitely as a man could, his desire that this money should be paid where it was paid. After that desire has been acted upon and the false Brubaker has received the money, it would seem too late for the plaintiff to discover his mistake and collect the money back from one who had paid it out to the individual he requested, though not to the one to whom he thought he was requesting to have it paid.

10. Liability of Collecting Bank.

Kershaw v. Ladd. 34 Ore. 375.

Kershaw sent a check drawn by himself on the United States Banking Company to Ladd and Tilton, bankers, with instructions to collect, and remit a certificate of deposit. They forwarded the check to the Banking Company the same day for collection, and received some six days later a check on the Merchants' National Bank, which they then presented for payment, which was refused on the ground that the Banking Company had suspended payment. Kershaw sues on the theory that the defendants were guilty of negligence in forwarding the check direct to the bank on which it was drawn, instead of taking other measures for collection.

Held, that sending a check direct to the drawee for collection is not negligence.

Wolverton, C. J.

The rule governing the time in which the holder is required to present a check in order to relieve himself from the risk of loss by failure of the drawee may be stated as follows: If the payee receives the check in the same place where the bank upon which it is drawn is located, he may present it for payment at any time before the close of banking hours of the next secular day, and thereby maintain recourse against the drawer. If, in the meantime, the bank fails, the loss will be the drawer's. The term "secular day" is used to exclude Sunday, so that, if the check be received on Saturday, the payee would have all day on the Monday following in which to make the presentment. But, if the payee receives the check in a place distant from where the drawee bank is situated, it will be sufficient for him to forward it by post, on the next secular day after it is received, to some person at the latter place, who is required to present it for payment on or before the next day after it

reaches him in due course of mail. These periods, depending upon the location of the respective participants, which are declared requisite for the convenient presentment of a check, are deemed to have been contemplated by the drawer, and he remains absolutely liable, although the bank might fail pending their duration. The allowance of a day, however, in which to present the check does not extend to an agent who receives one for the debt of his principal. Such a check must be presented with due and proper diligence; otherwise, it is at the peril of the party retaining it and postponing presentment, as between him and the person in whose interest he is acting. The rules in respect to giving notice of the dishonor of a check are the same as where a bill of exchange or promissory note is involved. If anything, however, by reason of the intention of the parties to the instrument that the payment should be immediate, and of the fact that it is drawn against a deposit, they are to be more strictly construed and enforced in the case of a check than of other commercial paper.

Cases are cited and relied upon by the appellant, wherein it is held to constitute an act of negligence, and even negligence *per se*, for the collecting bank to send paper direct to the drawee bank, located at a distant place, for collection and return.

But in no one of these cases was there a general and universal custom relied upon to support the act of the collecting bank, as there is here.

The specific charges of negligence are that defendants sent the check direct to the drawee bank for collection, and retained the evidence of indebtedness until after the bank had closed. Upon the first ground we have seen that the act of sending the check direct to the drawee for collection was not negligence, under the usage and custom prevailing, and in the light of defendants' undertaking; and, upon the second ground, it is plain that plaintiff could not have been injured by the retention of the check, as he was enabled to and did sue without it.

Chapter VI.

PARTNERSHIP.

I.

NATURE OF PARTNERSHIP.

The law of that form of association known as partnership has its source in the law merchant, but has been so affected by common law rules and interpretation that considerable confusion has resulted. This is chiefly owing to the fact that the law merchant originally looked upon a partnership as an entity in many respects different from the individual members who compose it, a view still largely held by business men, whereas the law courts have impressed this form of organization with common law theories of individual responsibility. For most legal purposes, then, the firm is an aggregate of individuals who are personally responsible for its obligations. This entire body of law was practically unknown before the end of the eighteenth century, largely because questions of this nature were prior to that time determined according to the special customs of the merchants, which were proved as facts in each particular case before the court. For this reason, the law of partnership has only comparatively recently become settled. A great step toward uniformity of decision has been made by the enactment in a number of states of the Uniform Partnership Act in an attempt to reconcile the mercantile and common law points of view. While a number of jurisdictions* have adopted the Act within the last few years, it has not met with as much favor as the Uniform Sales Act and the Negotiable Instruments Act, and on that account this chapter will, in general, follow the common law decisions.

A partnership is the relation which results from the association of two or more persons to carry on a business for profit, by virtue of a contract, express or implied, under which the property and profits, or the profits alone, belong to the parties as co-owners. The persons forming the relation are known as partners, or co-partners, who, taken collectively, are sometimes called the "firm."

* Alaska, Illinois, Maryland, Michigan, New Jersey, New York, Pennsylvania, Tennessee, Virginia, Wisconsin, Wyoming.

A partnership involves the following elements:

1. A contract, express or implied. In the absence of a contract to that effect, no partnership between the parties can be formed. The mere fact that persons associated together call themselves partners does not make them such unless their acts bring them within that relationship; neither will a stipulation that an association is not a partnership avail to avoid liability if the contract is really one of partnership. As far as third persons are concerned, an individual may be held as a partner in the firm if he has allowed himself to be held out as such under circumstances which estop him from denying that that relationship exists. The contract need be in no particular form and the ordinary rules of the law of contracts apply.
2. A business venture. When parties combine for a purpose other than that of mutual profit, no partnership exists. Labor unions, clubs and voluntary associations formed for social or fraternal purposes are not partnerships. In order to hold an individual member of such an organization, it must be shown that he has authorized, or subsequently ratified, the act of the agent for which he is sought to be held.
3. Property and profits, or profits alone, which belong to the parties as co-owners. A joint interest in profits is not of itself enough to create a partnership. There must be the further element of mutual ownership. The profits must be shared as profits, and not in lieu of rent, interest, wages, or other compensation. However, it is not necessary that the co-ownership extend to the property used in the firm business, for the entire capital may belong to one or more of the partners individually.

In the history of the law of partnership, several tests of the existence of the relationship have been suggested and later discarded. At the present time, there are two main questions which must be answered in the affirmative in order that the association shall result in partnership:

1. Do the persons sought to be held as partners share the profits as such?
2. Is there a mutual agency between them as to firm affairs?

The first test is the more important criterion. If it is finally determined that this test is satisfied, there can be no doubt as to the existence of a partnership where the other elements of the rela-

tionship, just indicated, are present. This rule is, however, difficult of application, as it is often a matter of some nicety to determine whether profits are shared as profits or in some other capacity.

The following principles arise from the application of this test:

1. Sharing profits of a business gives rise to the presumption that a partnership exists between the participants on the ground that one who shares the profits of a business, as a co-owner, should share losses if they occur.
2. An agreement between business associates that they will share the losses, but not the profits of a business, does not create a partnership.
3. Partnership is never the result of an agreement to share gross profits.
4. If the profits are shared as interest, rent, or compensation, the presumption of partnership is rebutted.
5. Co-ownership, though often an incident of partnership, is in and of itself no evidence of partnership; when taken in connection with other circumstances, it may be some evidence of the relationship.

Similarly, the test of mutual agency in dealing with firm affairs is ordinarily conclusive, if satisfactorily proved. The difficulty with this test, however, lies in the fact that the mutual agency is very often the result of the partnership relation rather than a means of determining its existence. Nevertheless, this test is by many courts held to be final.

Much confusion has resulted in the cases from failure to distinguish between the applicability of the foregoing principles to cases in which the issue is between persons claiming to be members of the firm, and to cases in which outside parties are concerned. It is sometimes said that unless these tests are satisfied there is no partnership between the contracting parties, whereas a partnership as to third persons may result without them. This is true in one sense, but in one sense only. Unless there is a real partnership between the parties there can be no real partnership as to third persons; but in the absence of any partnership or beyond the scope of an actual partnership, a person may be estopped as to third persons to deny that he is liable as upon a partnership transaction. This liability can arise only if the party sought to be charged has held himself out as a partner, or has knowingly permitted others to hold him out as such; and, in addition, the third party must have been actually misled by the holding out. Beyond this limitation, there can be no partnership as to third persons when there is no partnership between the parties.

In many states, business may be conducted under a so-called declaration of trust. In this form of organization, the business is operated by a trustee or trustees who conduct its affairs under a deed of trust which specifies the interest of the real owners, who receive certificates from the trustees as evidence of their ownership. Such an agreement is regarded as a partnership if the certificate owners can control the acts of the trustees, who in that event act merely as agents for them. If, on the other hand, the certificate holders have no power to direct the acts of the trustees, they are not liable as partners.

A number of states by statute authorize the creation of organizations known as joint-stock companies. These companies resemble a corporation in form but are in reality a kind of partnership, as they represent no legal entity apart from the members who compose them. Business is conducted by directors, but unless the statute otherwise provides, suit is brought against all stockholders, who are always liable as partners. There is no intermediate form between a corporation and a partnership.

A. Nature of Partnership in General.

1. Definition.

Pooley v. Driver. L. R. 5 Ch. D. (Eng.) 458.

Borrett & Hagen were partners in the manufacture of grease and pitch. Each contributed a certain part of the capital, and each gave his time to the business. The rest of the capital was contributed by other persons, among whom were the defendants, under an agreement that they should each have a proportionate interest in the business, and should each receive a share of the profits in return for his investment, and it was further agreed that the money should be paid back preferentially when the partnership was wound up. It was also agreed that this arrangement should be called a loan, and that the contributors should not have a share in the management of the business. This suit is brought by Pooley, the holder of bills of exchange indorsed by Borrett & Company, which went into liquidation, to hold the defendants as partners.

Held, that if a person intends to assume the obligations involved in a partnership, he becomes a partner and is liable for firm debts.

Jessel, M. R.

I am not going to define a partnership. The attempt has been made by very many people, and some of the attempts are collected together in the well-known book by Mr. Lindley. He gives

fifteen definitions of partnership by different learned lawyers. I think no two of them exactly agree, but there is considerable agreement amongst them; and I suppose anybody reading the fifteen may get a general notion of what partnership means. But I am not left to decide this case on any notions of my own of what is a partnership. Whatever may amount to a partnership is a subject which has been settled by decision according to English law, and the incidents of the partnership simply follow from the establishment of the fact of the partnership. If the partnership is established as a fact, then the liability to creditors is a mere incident flowing from the establishment of the fact. But it is a contract of some kind undoubtedly—a contract, like all contracts, involving the mutual consent of the parties; and it is undoubtedly a contract for the purpose of carrying on a commercial business—that is, a business bringing profit, and dividing the profit in some shape or other between the partners. That certainly partnership is. Whether it is anything more or not has been a question between various authorities, but it is that certainly.

The Civil Code of New York gives this as a definition: "Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them." It is undoubtedly that. Whether it is that and something more is a question of consideration, some writers adding qualifications which are not to be found in that definition, and others excepting out of it even the community of profit; but it is at least that. There could not be a partnership without there was a commercial business to be carried on with a view to profit and for division of profits; as a general rule, I take it, if it fulfill that definition, it is a partnership. I say as a general rule, that simple definition appears, so far as it goes, to be an accurate definition.

Then whether or not the association requires that one or more of the partners shall contribute labour or skill, or what they shall contribute, is a question which may be considered as subsidiary; but I take it that the ordinary meaning of the word "Partnership" is that, no doubt as a rule, each partner does contribute something, either in the shape of property or skill. But it is not a universal rule.

You can have, undoubtedly, according to English law, a dormant partner who puts nothing in—neither capital, nor skill, nor anything else. In fact, those who are familiar with partnerships know it is by no means uncommon to give a share to the widow or relative of some former partner who contributes nothing at all, neither name, nor skill, nor anything else. Therefore, it is not quite accurate, as Chancellor Kent puts it, that they must contribute labour, skill, or money, or some or all of them.

Pothier has a definition in which he says it is "a contract by which two or more people put, or contract to put, in common something to make in common an honest profit, which they pledge themselves to render an account of to one another." Pothier has the words "an honest profit." Of course the business might be that of

a highwayman, and that could hardly have been meant by the framers of the New York Code, and I must assume that they meant some honest calling, which is supplied by Pothier's definition. It shows that even in the most accurate definitions inserted in a Code something must be supplied which is not expressed.

Then Pothier says they must have "something in common" but as I said before, that is not necessary according to the English notion of partnership. The dormant partner may put in nothing whatever, as in the case of the widow or child of a deceased partner; therefore that shows again the enormous difficulty of giving a definition which shall be applicable to all cases. As I have already said, the New York definition, with the words I have put into it, will certainly be sufficient for this purpose, without considering whether it is accurate in every respect; and I may again say that, although one of the definitions speaks of a community of loss, as a rule they do not.

This association which I have to consider certainly comes within about twelve out of the fifteen definitions, therefore *prima facie* this is a partnership according to those definitions.

The partnership was for the term of fourteen years; the loan also was for the same term. If the partnership comes to an end sooner, the loan must come to an end sooner; so that, in fact, if you were to describe the contributors as dormant partners in the concern, liable to a limited extent to loss, and with a guarantee of their capital from the active partners, you would exactly describe their position; and I do not know of any other shorter mode of describing the position of these contributors.

I have come to a clear conclusion that the true relation of the parties towards one another was that of dormant and active partners, and not of mere creditors and debtors.

2. Partnership as Agency.

Samstag and Hilder Brothers v. Ottenheimer. 90 Conn. 475.

The plaintiff corporation sues to recover the price of merchandise sold to the defendants, who formerly conducted a business in New Haven under the firm name of Ottenheimer and Weil. Ottenheimer, in the name of the firm, ordered goods of the plaintiff to be delivered to him in New York, where there was no firm business. Weil was ignorant of the entire transaction, and seeks to defend on the ground that this transaction was not within the scope of the partnership.

Held, that one partner is not liable for debts incurred by another outside the scope of the partnership business.

Roraback, J.

An exhaustive definition of partnership is not easy. So far

as the facts in the case present the question of partnership it is sufficiently accurate to say that there is a partnership between two or more persons whenever such a relation exists between them that each is as to all the others, in respect to some business, both principal and agent. If such a relation exists they are partners; otherwise not. They are partners in that business in respect to which there is this relation; and as to any other business they are not partners. Partnership is but a name for this reciprocal relation. Contracts made by one of several partners, in respect to matters not falling within the ordinary business objects and scope of the partnership, are not binding on the other partners, and create no liability to third persons, who have no knowledge that the partner making the contract is acting in violation of his duties and obligations to the firm of which he is a member.

It cannot be seriously claimed that the character of this transaction in New York City was such as to justify the plaintiff in assuming that the defendant could be made liable for these goods. The facts were such as to indicate the contrary. Under the circumstances surrounding this affair it would have been reasonable for the plaintiff to have made an inquiry as to the liability of the defendant to pay a debt of this kind. There is nothing to show that the plaintiff was warranted in selling to Ottenheimer on the credit of the defendant, on account of previous dealings between the parties. No business transaction had ever taken place between them. There was nothing in the general course of the defendant's business that would have warranted the plaintiff in treating Ottenheimer as the defendant's agent for buying goods on credit. It was not shown that Weil or any one having authority to act for the defendant assented to the purchase. Weil never heard of the matter until after the goods were bought.

The plaintiff bases his right of recovery solely upon the declarations of Ottenheimer, as he was a partner in the New Haven company. Each member of a firm is the general agent of the firm in relation to all the business of the firm, and can bind the firm in what he says and does in such business. But when one partner has a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declaration or acts in the transaction.

3. Contractual Basis.

Phillips v. Phillips. 49 Ill. 437.

John S. Phillips, the son of John Phillips, worked for his father at making chairs from an early age, and after attaining his majority continued so to do. Other brothers did the same. John S. Phillips claims the right of a partner in the business, basing his contention upon the fact that the sons all devoted their

time to it without regular salaries, that funds drawn from the concern for their support were debited to each one separately, and that the father had stated to third persons that the sons were interested in the business. The defense is that there was no agreement to make a partnership, but that the sons served the father under the distinct and often declared understanding that all should belong to him during his life and at his death the business and property should be left to his children as he should think proper.

Held, that there can be no partnership without a contract express or implied.

Caton, C. J.

The only question in this case is one of fact. Was there a co-partnership between John Phillips and his four sons, or was he the sole proprietor of the business about which the controversy has arisen? It must be remembered in the outset, that this is a controversy *inter sese*, and is not between third parties, and the alleged members of the firm. Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties to a firm. A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone cannot create a partnership without the assent of the others. If John S. Phillips designed and really believed that there was a partnership, but to which his father and brothers never assented, and in the existence of which they did not believe, then there was no partnership, unless, indeed, a co-partnership could be formed and conducted without their knowledge or consent. This would be simply absurd. We cannot in this way surprise them into a partnership of which they never dreamed.

If such was the understanding and purpose of the parties, then there was no partnership. Originally, undoubtedly the entire concern belonged to the father; and it so continued, unless by the agreement of the father, the sons were admitted into the concern as partners; for, we know of no means by which the sons could become partners with the father, and thus acquire a title to his property, without his knowledge or consent.

4. Necessity of Intent to Form Partnership.

Bacon v. Christian. 184 Ind. 517.

Bacon and Christian contemplated forming a corporation for the purpose of buying and selling lumber, but had not yet incor-

porated. In the meantime, each contributed money and drew on the capital and assets thus contributed for the purposes of the business, without actually intending to form a partnership. In a suit for an accounting, the question arises whether a partnership was formed.

Held, that without express intent, a partnership may be formed by acts of the parties.

Spencer, J.

It is apparent that to establish the partnership relation as between the parties, there must be (1) a voluntary contract of association for the purpose of sharing the profits and losses, as such, which may arise from the use of capital, labor or skill in a common enterprise; and (2) an intention on the part of the principals to form a partnership for that purpose. But it must be borne in mind, however, that the intent, the existence of which is deemed essential, is an intent to do those things which constitute a partnership. Hence, if such an intent exists, the parties will be partners notwithstanding that they purposed to avoid the liability attaching to partners or even expressly stipulated in their agreement that they were not to become partners.

It is the substance, and not the name of the arrangement between them, which determines their legal relation toward each other, and if, from a consideration of all the facts and circumstances, it appears that the parties intended, between themselves, that there should be a community of interest of both the property and profits of a common business venture, the law treats it as their intention to become partners, in the absence of other controlling facts. So, in the case at bar, although the parties originally may have purposed to form a corporation, it is undisputed that no effort was made to carry out that part of their agreement. The fact that one of the parties failed to contribute any or all of his agreed share of the partnership funds is not material where, as in this case, he exercised the rights of a proprietor over the assets which the firm in fact possessed.

5. Necessity of Community of Interest.

Dwinel v. Stone. 30 Me. 384.

Dwinel sues Sawtell upon a claim in which he summons Stone as trustee for Sawtell. Stone defends on the ground that there was a partnership between himself and Sawtell and that he can accordingly not be held as trustee. Stone had purchased the right to take timber from certain property, and Sawtell assisted in cutting and hauling the logs, under an agreement whereby he received a share of the profits. Title to all the property was in Stone, who

had repeatedly said, however, that there was a partnership between himself and Sawtell.

Held, that there must be a community of interest in the subject matter in order to constitute a partnership.

Shepley, C. J.

Partnerships are of different kinds. Some are general, and others are limited to a particular business or to one transaction. There may be a partnership embracing a capital invested in the business and also the profit and loss arising out of it. And there may be a partnership embracing only the profit and loss. There may be also business transactions from which the persons concerned may receive profits and be subjected to losses; and yet there may be no partnership. The mere fact of a participation in profit and loss does not necessarily constitute a partnership. Many of the elements constituting one may exist, while others equally essential do not.

One essential element of a partnership is a community of interest in the subject matter of it. From this arises the right of each partner to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power, as all the partners could when acting together.

Another element is, that upon a dissolution of the partnership by the death of one of the partners, the survivors become entitled to retain and dispose of the partnership effects for a settlement of all its affairs and for a distribution of the remaining fund. However the arrangement of business may assimilate it to a partnership, if it be such that on the death of one interested this becomes impossible, it will be evidence that there was no proper partnership existing.

By the application of these rules, it will not be difficult to determine whether a partnership proper is proved to have existed by the answers of the defendant. Whether one existed or not, is an inference of law from the facts; and his frequent statements that they were partners can have no effect.

There could be no community of interest between the defendant [and] Sawtell in the capital, upon which the labor was performed and the business transacted. The labor was performed upon the lumber, and its price or value became immediately incorporated with it. There were no funds, no effects, no means, for profit and loss separate from the lumber or capital. There could therefore be no profit and loss or interest separate from the capital, in which there was a community of interest, and which could constitute a partnership proper.

The transaction was similar in principle to that of a common enterprise for profit and loss, which does not constitute a partnership, although it may combine some of its elements. As in a case where the owner of a lighter agreed with a person to work in it, and to divide with him the profit and loss, or where goods were purchased

on the credit of one to be transported and sold by another, under an agreement to divide the profits, or, as in case of a shipment of specie or timber, upon an agreement to divide the profits, or, as on an adventure in a whaling voyage, or in a contract of "mateship" where there is an agreement to share the profits, or, as in the manufacture of goods from the raw material, under an agreement to share the net profits, or, it may perhaps, in principle, be more like the case where two persons agreed to do a job of work on joint account. In such case, they must share in the profit and loss, and yet they were not regarded as partners.

B. Tests of Existence of Partnership.

I. Sharing Profits.

Eastman v. Clark. 53 N. H. 276.

Eastman sues C. C. Clark, D. Y. Clark and Stillings to recover a balance due for corn sold by him to the defendants, who were engaged in running a line of stages between the Crawford House in the White Mountain Notch and the town of Jackson. The Clarks and Stillings each contributed teams and a driver for the line. There was some conflict in the testimony whether each party supported his stock at his own expense, or whether it was all supported at joint expense. There was also a conflict as to whether net or gross profits were divided. The court instructed the jury that the defendants were partners in respect to third persons if net or gross receipts were divided, and would be jointly liable to the plaintiff. The question arises whether the instruction was correct.

Held, that division of profits is not in itself a controlling test of partnership.

Doe, J.

It has been supposed that a sharing-profit test, with divers exceptions, qualifications, and explanations, was, at one time, established by the authorities. It has been supposed that it was established in England in the latter part of the eighteenth century; that it was settled in the class of cases generally ranged under the leading case of *Waugh v. Carver*, 2 H. Bl. 235; that it was upheld until 1860, and that it was then overthrown by the decision in *Cox v. Hickman*, 8 House of Lords Cases 268. *Cox v. Hickman*, and the subsequent English cases, maintain that there is no such test; that the question of partnership liability is a question of the liability of a principal; that, so far as it is a question of law, it is governed by the general doctrines called law of agency or law of principal and

agent when applied in a case of an agent and one principal, and called law of partnership when applied in a case where the agent is a joint principal; and that so far as it is a question of fact, sharing profits is evidence tending to show that the sharer is a principal. From 1860 to the present time, that has been held to be the common law of England.

Neither is such a test established by a preponderance of the weight of American cases, decided without reference to *Cox v. Hickman*. The subject has been much considered in Massachusetts; and the result is far from being a simple, absolute sharing-profits test. Of course, if one shares profits, "as a principal," i.e. in the capacity of a principal, he is a principal; and so he is if he does anything else in that capacity.

When sharing profits is accepted as a test, it is always universally with this qualification, that if the profits are received as compensation for services, or payment of any debt, sharing them is not a test. Add together all the exceptions recognized by the authorities, and the rule amounts to this: a sharer of profits is a partner in those cases in which he is not a creditor.

The sharing-profits test, in this modified form, enveloped in and consolidated with its mass of qualifications and exceptions,—the only form in which it can be claimed to be established by the authorities,—is nothing but the elementary doctrine of the liability of a principal, disclosed or undisclosed, on an authorized contract made by his agent, which is the doctrine of *Cox v. Hickman*, and the subsequent English cases.

A right to participate in profits, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for, or on behalf of, the person setting up such a claim.

2. Sharing Profits.

Leggett v. Hyde. 58 N. Y. 272.

Hyde invested money with the firm of A. D. Putnam & Co. to be used in the business for one year, under an agreement that he was to receive one-third of the profits, and be repaid the amount invested if at the end of the year he did not elect to become a partner. The plaintiffs seek to hold Hyde as a partner in an action for goods sold and delivered.

Held, that under the minority rule a person interested in the profits of a business, as such, is a partner as to third persons.

Folger, J.

In the first place, it matters not that the defendants meant not

to be partners at all, and were not partners *inter sese*. They may be partners as to third persons notwithstanding. And this effect may result, though they should have taken pains to stipulate among themselves that they will not, in any event, hold the relation of partners. Among the reasons given is this, whether it be strong or weak: that whatever person shares in the profits of any concern, shall be liable to creditors for losses also, since he takes a part of the fund, which in great measure is the creditor's security for the payment of the debts to them. "The principle laid down has served as the foundation of a long line of decisions which cannot now be overruled by any authority short of that of the legislature; and in all cases in which there is no incorporation, nor limited liability, it must still be regarded as binding on the courts." And so Mr. Parsons, in his book on Partnership, quoting Lord Eldon, "But if he has a specific interest in the profits themselves, as profits, he is a partner," and adds, "undoubtedly he is; every principle of the law of partnership leads to this conclusion." He contends, however, that the specific interest in profits which is to make a person a partner, must be a proprietary interest in them, existing before the division of them into shares. "The test of partnership is a community of profit; a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services." The courts of this state have always adhered to this doctrine and applied or recognized it in the cases coming before them.

There have been from time to time certain exceptions established to this rule in a broad statement of it; but the decisions by which these exceptions have been set up still recognize the rule that where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker or employee, who, with no interest in the capital or business, is to be remunerated for his services, by a compensation from the profits, or by a compensation measured by the profits; or with that of seamen, on whaling or other like voyages, whose reimbursement for their time and labor is to finally depend upon the result of the whole voyage. There are other exceptions, like tenants of land, or a ferry, or an inn, who are to share with the owners in results, as a means of compensation for their labor and services. The decisions which establish these exceptions do not profess to abrogate the rule—only to limit it.

It is claimed by the learned counsel for the appellant, that the rule as announced in *Waugh v. Carver*, 2 H. Bl. 235, has been exploded, and another rule propounded which shields the appellant. He is correct so far as the courts in England are concerned.

It is sufficient to say that the rule remains in this state as it has long been, and we should be governed by it until here, as in England, the legislature shall see fit to abrogate it.*

* Cf. Uniform Partnership Act, now adopted in New York.

3. Mutual Agency.

Cox v. Hickman. 8 H. L. Cas. (Eng.) 268.

Smith and Son, who carried on business at the Stanton Iron Works, became financially embarrassed and executed a deed of trust to trustees selected from and by their creditors. These trustees were given power to carry on the business under the name "Stanton Iron Company," to divide the net income (which was deemed the property of Smith and Son) among the creditors in ratable proportion and to make rules for conducting the business and winding it up. It was further agreed that after all debts had been discharged, the property should be turned back to Smith and Son. The trustees gave Hickman a bill of exchange accepted by themselves "per proc. the Stanton Iron Company." Hickman sues Cox and Wheatcroft, creditors, alleging that they are partners in the business.

Held, that a partnership is created only when mutual agency arises.

Lord Cranworth:

It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, i.e., that he stood in the relation of principal toward the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal toward the ostensible members of the firm as his agents.

Lord Wensleydale:

The question is whether this deed makes the creditors who sign it partners with the trustees, or what is the same thing, agents, to bind them by acceptances on account of the business.

The law as to partnership is undoubtedly a branch of the law of principal and agent.

A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the property to him, is undoubtedly the principal, and is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade and share the profits of it, each is a principal and each is an agent for the other. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. This is the true principle of partnership liability.

4. Development of Test of Mutual Agency.

Boston & Colorado Smelting Co. v. Smith, 13 R. I. 27.

The Boston Smelting Company seeks to hold the defendants as partners in a chemical business conducted by the defendant, Smith. The other defendants had lent Smith \$5,000 for one year, agreeing to take as interest ten per cent of the net profits of the business.

Held, that sharing net profits as interest does not make the lender a partner.

Durfee, C. J.

The position taken by the plaintiff corporation was that a person who shares the profits ought to share the losses, because he takes a part of the fund out of which the losses are to be paid. But the ground will not bear examination; for, in point of fact, the losses are no more payable out of the profits than out of the capital, and it has been decided, quite inconsistently with this ground, that it is only a participation in the net, not the gross, profits, which makes the participant a *quasi* partner. Other grounds, but none more satisfactory, have been suggested. Indeed, the doctrine, though well received by some judges, appears to have been always regarded by others as an anomaly or legal solecism. It was soon relaxed in favor of agents or servants, who, it was held, might take a share of profits

by way of compensation for their services without becoming *quasi* partners. The English courts, however, refused to extend the exception to cover a loan of money, though upon principle it is impossible to discern any difference whether a portion of the profits goes to pay for services or for money contributed to the business.

Such was the state of the law, as it was generally understood, or, to put the matter as some of the later English judges prefer to put it, as it was generally misunderstood, when, in 1860, the House of Lords decided the case of *Cox v. Hickman*, 8 H.L. 268. The gist of that decision was that a mere participation in profits does not make the participant a partner unless he has in fact agreed to become such, but is only *prima facie* evidence that he is such, and is rebuttable by counter-proof to be found in the contract or transaction or in the circumstances connected with it. The real question is, it was held, Did the person who is sought to be charged on account of his participation in the profits ever enter into the relation of co-partner with the other participant, or, in other words, do they participate on the common footing of principals in the business? And, in explication of the question, it was said that the law of partnership is a branch of the law of agency, inasmuch as, wherever an actual partnership exists, the partner who ostensibly carries on the business does it for himself and as agent for his co-partners; or, to put the matter in another form, he and they carry it on through him on their joint account, so that in law, on the principle of agency, whatever he does in the prosecution of the business they do, and whatever debts he contracts they contract with him. In *Holme v. Hammond*, L. R. 7 Exch. 218, 230, it is stated that the import of the opinions delivered in the House of Lords, in *Cox v. Hickman* is correctly summed up by O'Brien, J., thus: "The principle to be collected from them appears to be, that a partnership, even as to third persons, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal and each an agent for the other."

The doctrine promulgated in the decision of *Cox v. Hickman* has been developed and applied in England in many subsequent cases, and may now be regarded as established law in that country. The doctrine has likewise been laid down or approved in many American cases. Indeed, it has been maintained that the American cases, generally, have never gone to the same extent as the earlier English cases.

In *Pooley v. Driver*, L. R. 5 Ch. D. 458, there was an agreement by the recipients of the accommodation to carry on the business "to the best of their ability." The court relied on this, in connection with other features of the contract, to show that a partnership was in reality created under the cover of a loan. For the law will not tolerate any evasion, but wherever the agreement creates as a matter of fact the relation of partnership, no mere words to the

contrary will prevent, as regards third persons, its having its legitimate consequences. In the case at bar, however, we find no reason to suspect any latent design to create a partnership under the disguise of a loan; for though there is here, as in *Pooley v. Driver*, an agreement on the part of the borrower to carry on the business to the best advantage, we do not think it affords any inference that a partnership was intended, for it is scarcely more than the law itself would require, namely, that the borrower shall conduct with good faith, and it is certainly less significant than the stipulations given in some of the cases cited. The lenders make it a condition of the loan that the borrower shall carry on the business to the best advantage, because they are dependent on him, the business being his and not theirs.

5. Intent of Partners.

Beecher v. Bush. 45 Mich. 188.

Bush seeks to charge Beecher as a partner of Williams for a bill of supplies furnished the Biddle House in Detroit. Beecher owned the building and Williams hired it for use as a hotel at a rental determined by the gross receipts and gross earnings.

Held, that a partnership does not exist unless the parties intend to create one.

Cooley, J.

We do not understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed that they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership, these parties meant should be wholly excluded from their arrangement. Some of these were of primary importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the most common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.

It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should "carry the doctrine of constructive partnership so far as to render it a trap to the unwary."

We have then a case in which the party it is sought to charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law.

What then are the *indicia* of partnership in this case; the marks which force that construction upon the court irrespective of the intent of the parties; that in fact control their intent, and give to the parties bringing suit rights which they were not aware of when they sold the supplies?

In the brief which has been presented in behalf of the defendants in error it is conceded that the fact that Beecher was to receive each day a sum "equal to one-third of the gross receipts and gross earnings" for the day, would not necessarily make him a partner. What is claimed is that the fact is "cogent evidence" that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportioned to him regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purposes of the parties, and throw light upon the question whether that which was to be received, was

to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was.

6. Effect of Sharing Profits as Between the Parties.

Davis v. Davis. (1894) 1 Ch. (Eng.) 393.

Edward Davis by his will left his business to his sons, G. T. Davis, the plaintiff, and C. F. Davis, who continued to operate it without an agreement of partnership. Each drew £3 a week, but otherwise no division of the profits was made. During the administration of the estate of Edward Davis, the question arises whether there was a partnership between G. T. and C. F. Davis.

Held, that a joint interest in profits is *prima facie* evidence of a partnership.

North, J.

As regards the business, there is, I think, sufficient to show that there was a partnership. In the first place, sect. 1 of the Partnership Act, 1890, provides that "partnership is the relation which subsists between persons carrying on a business in common with a view of profit." That exactly describes the present case. I do not say that that is of itself conclusive, but it comes precisely within the definition therein given of a partnership. The special case admits that profits were divided, because the £3 or more which was drawn out by each brother weekly was really a division of profits, and the case states that "save as aforesaid, no division of profits or other moneys was made." Whether that £3 a week was or was not entirely profit, at any rate it is clear that it was in part a division of profits. The sub-sects. 1 and 3 of sect. 2 of the Partnership Act, 1890, seem to me material. By sub-sect. 1: "Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof." Sub-sect. 3 is material, as bearing upon the question of partnership in the business, because I have come to the conclusion that there was a partnership in the business.

Sub-sect. 3 of sect. 2 of the Act is, "The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business." Now, that is exactly what took place here. Each of these brothers did receive at their regular drawings money derived, to some extent at any rate, from the profits of the business. Then sub-sect. 3 goes on: "But the receipt of such a share, or of a payment contingent on or varying with the

profits of a business does not of itself make him a partner in the business." We have, then, a statement in the Act that the receipt of a share of the profits of a business is *prima facie* evidence of a partnership, but that the receipt of such a share does not of itself make the receiver a partner in the business.

Adopting the rule of law which was laid down before the Act, and which seems to me to be precisely what is intended by sect. 2, sub-sect. 3, of the Act, the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in it, and, if the matter stops there, it is evidence upon which the court must act. But, if there are other circumstances to be considered, they ought to be considered fairly together; not holding that a partnership is proved by the receipt of a share of profits, unless it is rebutted by something else; but taking all the circumstances from the whole. In the present case I cannot treat the receipt of a share of the profits alone as *prima facie* evidence of a partnership if there are other circumstances to be considered side by side with it. But I cannot find any other circumstances which conflict with it.

7. What is Meant by Profits.

Buie v. Kennedy. 164 N. C. 290.

Kennedy Brothers and Buie formed a partnership in the turpentine business. The parties contributed the capital equally but agreed that three-fourths of the profits should belong to Buie and one-fourth to the others. This case arises out of the settlement of the partnership dealings, and the nature of the "profits" contemplated by the agreement is in issue.

Held, that an agreement to share "profits" relates to net profits.

Walker, J.

The first question presented is the one in regard to the profits. The authorities seem to hold it to be clear that an important distinction exists between the terms "profits" and "gross returns." Profits are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. The expressions "net profits" and "gross profits" are met with in the books, but they are inaccurate. "Profits" and "net profits" are, for all legal purposes, synonymous expressions. All profits are necessarily net, and no profits can possibly be gross. But the term "gross profits" is sometimes used to designate the returns. This use of the term, however, is inaccurate. A business is susceptible of "gross returns" and "net returns," and "profits" is the synonym of "net returns." The distinction between profits, on the one hand and gross returns on the other hand, is

obvious. It is said that an agreement to share gross returns does not create a partnership, for the reason that such an agreement is inconsistent with the joint ownership of the profits. In a partnership the profits are shared because the partners are joint owners of them. If no profits have been made, no partner is entitled to any share as against the others, for there is nothing to share. But where the agreement is to share gross returns, the share is independent of the existence of profits, and may be taken when there is a loss. It necessarily follows that an agreement to share gross returns creates a debt between the parties, and not a joint proprietorship in the profits. "Though the sum may come out of profits, if they are sufficient, it will, nevertheless, come out of somebody, though there be no profits. The fixed amount, which is independent of the success or failure of the business, betrays a stranger's interest, and not a principal's. A proprietor's share springs out of the business, and varies according to its vicissitudes. A principal who made no contribution himself could never take his co-partner's, and make gain out of his co-partner's loss and the failure of the business." We deduce the principle that the word "profits," when used in relation to the final distribution of the partnership effects or to the shares of the members upon a settlement of its affairs, means "net returns," that is, the gross returns after paying its liabilities and taking off the losses in the business and the costs and expenses of operation.

8. Sharing Profits to Satisfy Debt.

Mollwo, March & Co. v. The Court of Wards. L. R. 4 P. C. (Eng.) 419.

Watson & Co., doing business at Calcutta, entered into a written agreement with a Hindoo Rajah, whereby they agreed to carry on a merchandising business. The Rajah advanced money, received a commission of 20 per cent. of the profits until the whole of the debt should be paid, and had the right to control consignments of goods. Later the Rajah made further advances, and Watson & Co. executed a mortgage to him to secure the amounts. The firm of Watson & Co. became insolvent, and this suit is brought by Mollwo, March & Co. to charge the Rajah upon debts incurred by the firm.

Held, that sharing net profits in order to recover a debt due does not make a person a partner.

Sir Montague Smith:

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons; upon the

principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord Eldon) "to a given *quantum* of the profits."

The distinction was stated to be "clearly settled" and was acted upon by Lord Eldon in various cases. It was also affirmed and acted on where Tindal, C.J., in giving the judgment of the court, adopts the rule as laid down by Lord Eldon, and says: "Nor does it appear to make any difference whether the money is received by way of interest or money lent, or wages, or salary as agent, or commission on sales."

The present case appears to fall within this distinction. The Rajah was not entitled to a share of the profits "as such;" he had no specific property or interest in them *qua* profits, for, subject to the powers given to the Rajah by way of security, the Watsons might have appropriated or assigned the whole profits without any breach of the agreement. The Rajah was entitled only to commission, or payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox v. Hickman*, 8 H.L.C. 268, and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh v. Carver*, 2 H.Bl. 235, and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox v. Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be

inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner.

Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

It may well be, that where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended, viz., one of loan and security.

9. Sharing Profits as Interest.

Meehan v. Valentine. 145 U. S. 611.

Perry lent L. W. Counselman & Co. \$10,000, and it was agreed that he should receive in addition to interest one-tenth of the net profits above that amount. In a suit by Meehan against Perry's estate on a claim due from Counselman & Co., Valentine, the executor, contends that this agreement did not make Perry a partner.

Held, that sharing net profits as interest on a debt does not create a partnership.

Gray, J.

How far sharing in the profits of a partnership shall make one liable as a partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

The rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been

stipulated between him and his co-partners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent.

The decision, *Cox v. Hickman*, was put upon the ground that the liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive evidence that the business is carried on in part for the person receiving them; and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf.

This new form of stating the general rule did not at first prove easier of application than the old one; and, as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.

In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.

In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. And

it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect.

Upon the whole evidence, a jury would not be justified in inferring on the part of Perry, either "actual participation in the profits as principal," or that he authorized the business to be carried on in part for him or on his behalf. There being no partnership, in any sense, and Perry never having held himself out as a partner to the plaintiff or to those under whom he claimed the Circuit Court rightly ruled that the action could not be maintained.

10. Sharing Profits as Co-Owners.

Butler Savings Bank v. Osborne. 159 Pa. St. 10. .

Two firms, Osborne & Brothers and Carruthers & Peters, each bought an undivided half of two oil leases, which they operated jointly, dividing expenses, and each taking half the returns. The question arises, upon a sheriff's sale of the property of Osborne & Brothers, whether this arrangement made the two firms partners.

Held, that tenants in common do not become partners because of joint transactions.

Williams, J.

Tenants in common engaged in the improvement or development of the common property will be presumed, in the absence of proof of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began.

As to third persons, they may subject themselves to liability as partners by a course of dealing or by their acts and declarations, but as to each other their relation depends on their title, until, by their agreement with each other, they change it.

The law does not imply a partnership between tenants in common because of the fact that they agree to develop or operate the common property, since they may rightfully do this by virtue of their respective titles as part owners. The existence of an express agreement creating a partnership is negated by the finding of the auditor.

11. Statutory Tests of Existence of Partnership.

Laws of New York, 1919. Chapter 408, Article 2.

Section 11. Rules for determining the existence of a partnership.

In determining whether a partnership exists, these rules shall apply:

1. Except as provided by section twenty seven, persons who are not partners as to each other are not partners as to third persons.
2. Joint tenancies, tenancies in common, tenancies by the entirety, joint property, common property, or part ownership does not of itself establish a partnership whether such owners do or do not share any profits made by the use of the property.
3. The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
4. The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
 - (a) as a debt by installments or otherwise,
 - (b) as wages of an employee or rent to a landlord,
 - (c) as an annuity to a widow or representative of a deceased partner,
 - (d) as interest on a loan, though the amount of payment vary with the profits of the business,
 - (e) as a consideration for the sale of the good-will of a business or other property by installments or otherwise.

II.

OPERATION OF PARTNERSHIP.

The contract of partnership involves special rights and liabilities in regard to the firm and its assets, to third persons dealing with it, and between the partners themselves. These special rights and liabilities arise out of the distinction between the firm and the individuals who compose it. For certain purposes, for example, those of suit, the law regards the associates as individuals. For other purposes, for example, rights of creditors against firm assets, the law inclines to regard the firm as a unit. These distinctions lead to the necessity of determining the nature of a partner's interest in firm property and also to a discussion of his rights and liabilities with reference thereto.

A partner's interest is not merely that of a co-owner even though the title is in the partners as such, but it is rather the right to share in the surplus remaining after creditors have been satis-

fied and original contributions returned. For this reason, while a partner may sell his interest to another and thereby dissolve the firm, the purchaser acquires merely the rights of the vendor partner upon a winding up.

Firm property is any property which has been contributed by the partners to the firm for firm purposes and also any property purchased with firm funds for the business. It is not necessary that all or any property used by the firm shall belong to it, for the partners may, by agreement, elect to consider it the individual property of the partner who allows it to be used; but whether he makes formal conveyance of the legal title or not, if the property is turned over to the firm as the contribution of an individual partner, it will be considered to belong to the firm, and will be treated as firm assets in winding up. In addition to real and personal property or money which the firm may thus acquire by contribution, by purchase, or as profits, the firm owns certain intangible rights arising out of the association. Foremost among these rights, and inclusive of most of them, is the good will of the firm, which has been defined as the "expectation of continued public patronage." It is recognized by the law as an asset which may be taxed, sold or transferred. When it is sold, the firm, or the individual partner releasing his share of the good will to the firm, is not allowed to compete in such a way as to destroy or abridge its value: the transferor cannot retain the benefit of that which he has transferred. If the sale is not the free act of the firm or of the partner, however, but results from judicial proceedings, the right to compete is not destroyed, even though the good will arising from the old association is otherwise the property of another. In this connection, cases very often arise upon a sale of the firm name as part of the good will. Here, the general rule is that the name of the firm as such may be sold voluntarily or involuntarily as part of the good will, but the right of an individual to use his own name in business cannot be taken away unless he has expressly limited that right by contract.

Title to personal property may be held in the firm name or by one or more of the members as individuals. Irrespective of the method of acquiring or holding title, the real ownership is in the partners as a firm, and not in the individual members as co-owners.

Title to real estate must, at common law, be in the name of one or more individuals of the firm who hold it in trust for partnership purposes. Under the Uniform Partnership Act it may be acquired in the name of the firm. While the partnership continues, firm real estate may be dealt with for partnership purposes with-

out reference to the ordinary incidents of that form of property, such as the widow's right of dower, but when these purposes are fulfilled, it again assumes its usual character. In England, firm real estate is treated as personal property for all purposes and is looked upon simply as a part of the firm's assets to be reduced to a value and so spread upon the books. The American rule is that the change of character of real to personal estate is worked, if at all, only in order to adjust the affairs of the partnership; the personal character does not adhere to it for any other purpose.

On account of the peculiar nature of the partner's interest in firm property, the rights of firm and personal creditors sometimes come into conflict. A firm creditor may seize on attachment either firm or individual property, as the partners are jointly and severally liable to him. An individual creditor may not attach more than the share of his debtor in firm property. In many jurisdictions, he may not do this in such a way as to interfere with the firm business, though practically all provide some means of reaching the interest of an individual member in firm assets. From these rules, it follows that:

1. A debt due a partner individually may be attached by a firm creditor, and such an attachment is not dissolved by a subsequent attachment of the same fund by an individual creditor.
2. A debt due the firm cannot be attached in a suit by a separate creditor of one partner.

The partners are the agents of the firm and also of each other. For this reason, the ordinary rules of agency apply to the partnership relation. A partner has power to bind the firm by any act done within the express or implied scope of his authority. In addition to express and implied powers, a partner has ostensible authority to bind the firm by acts which are ordinarily within the implied powers of members of firms engaged in similar business. In a trading firm, the following powers are to be assumed:

1. To borrow money.
2. To mortgage or sell all the assets in the course of business.
3. To give promissory notes.
4. To bind the firm by admissions.

In a non-trading firm, a partner does not have the same implied authority in reference to financial obligations of the firm. A third party has no right to consider that such transactions would be in the natural course of business.

A partner has no implied authority:

1. To give negotiable paper for a private debt or for the accommodation of third persons.
2. To execute a deed or (usually) other sealed instrument except in those cases when an agent may make a sealed contract without previously sealed authority by his principal, and in those cases when a joint contracting party may bind the others by a contract under seal, as for example, a release of joint demands.
3. To bind the firm by the guaranty of the debt of another.
4. To impose any new obligation after the firm is dissolved. A member engaged in winding up the business may nevertheless sell assets, collect debts, and do whatever is necessary for that purpose.

The firm is liable for torts of the partners committed in the course of the partnership business. This rule applies to wilful and negligent torts done for firm purposes, or for purposes by which it is intended that the firm shall benefit.

The partnership relation is primarily one of trust. For that reason, a contract to form a partnership is not specifically enforceable. Furthermore, after the relationship is once assumed, the partners must deal openly with each other and in the utmost good faith. From this conception of the relationship, it follows that:

1. A partner may not compete directly or indirectly with the business of the firm.
2. Partners are responsible for secret profits made in competitive transactions.
3. A partner may not acquire or carry on for his individual profit, business which he would have been unable to secure except for his connection with the firm.
4. In the absence of exceptional circumstances amounting to agreement, a partner is not entitled to extra compensation. This is true regardless of the additional amount of work done and regardless of the circumstances which make it necessary.
5. Suits at law may not be brought by one partner against another upon any transaction involving partnership affairs, except to recover an ascertained balance due. Ordinarily, the only way in which differences arising out of partnership transactions may be settled in the courts is by suit for an accounting, which usually results in dissolution. In matters outside the scope of the partnership, the rule does not apply and partners may sue each other as if they were strangers.

A. Partnership Property.

1. Nature of Partner's Interest.

Morrison v. The Austin State Bank, 213 Ill. 472.

The Austin State Bank was the innocent holder of non-negotiable vouchers issued by the town of Cicero for work done by the firm of Morrison & Co. & O'Brien, which were indorsed by O'Brien to his father in payment of a personal debt without authority from his partners. The other members of the firm repudiate the indorsement and bring this bill for an accounting against O'Brien. The question arises whether a partner may transfer partnership property without authority from the other members of the firm.

Held, that a person who knowingly receives partnership property from one partner in payment of an individual debt acquires no title against the firm.

Ricks, C. J.

The legal characteristics of partnership property, and the interests, powers and rights of the partners relative to the same, are peculiar, and cannot be well assimilated to any other class of property when viewed in its relation to its ownership. While it has many characteristics of estates in common and in joint tenancy, yet the interest of partners in the firm property is neither that of joint tenants nor that of tenants in common, but is *sui generis*. Each partner is possessed *per my et per tout*—that is, by the half or moiety and by all—or, in other words, each has a joint interest in the whole but not a separate interest in any particular part of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a moiety or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not. But their several degrees of interest must be regulated according to the stipulated proportions and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no exclusive right to any part of the joint effects until a balance of accounts be struck between him and his co-partners and it be ascertained precisely what is the actual amount of his interest. If he sell his interest in the partnership without the consent of his partner that the purchaser shall become a partner and succeed him in the partnership, the purchaser does not by his purchase become a partner, but simply becomes the owner of the proportion his vendor held in the partnership after the closing up of the partnership and the payment of the partnership debts. If a partner die, his heirs do not succeed to his rights as a partner nor to the partnership property

—and particularly so where it is personal property—but the surviving partners hold all the property until the closing up and settlement of the partnership, when the heirs succeed merely to the proportionate share of the remaining assets. These attributes of such property arise in a large degree from the existence of the situation of two or more persons having interests in the business, being clothed with power to conduct it. They owe fidelity to each other, and the firm, as such, owes good faith to the public, and it is in the adjustment of the respective rights and duties between the partners and the public that the qualities peculiar to this property are given it. Where a business is being conducted by a number of persons who are owners of that business, it is necessary that each of the persons so owning shall be invested with power to do all things in the regular, necessary and usual course of business, and when they do so it is necessary and proper that those who deal with them shall be protected. These considerations have led the courts to require of persons who deal with partnerships to take notice of the partnership, the identity of its members, the character of the partnership, its business and the general course of that business, as the public owes to the partnership the same fidelity, when dealing with its individual members, that the partnership owes to the public in such cases. Ordinarily partnerships are conducted for profit. The property of the partnership is usually sold for money and the money re-invested, and through these means the business is kept up. The return of sales received by each partner is for the partnership—the result and representative of the partnership goods—and is to be accounted for to the partnership or turned into it by the person who makes the sale. These matters are, and must be, known to all persons who deal with them. The partner who makes disposition of partnership goods that the benefit may come to him alone perpetrates a fraud upon the partnership, and the person who deals with him knowing that such is to be the result is a party to that fraud and can receive no benefit from it. When Thomas O'Brien, the father of George I. O'Brien, received from him the warrants or vouchers in question for the payment of money that belonged to the partnership, of which appellant was one, in payment of a past due debt to himself from his son and not from the partnership, he knew that his son was making a fraudulent use of the partnership property, and being a party to that fraud he did not and could not take anything by it. As between him and the partnership it was as though the transaction had not been made at all, or as though he had found or stolen the property acquired by him through such means. True it is that the public, in dealing with a partner in the regular course of business, is not required to see that the partner accounts for the funds received by him for the partnership property. If a purchase be made in good faith or an assignment of paper belonging to the partnership shall be made by one of the partners in the firm name for a cash consideration that is a fair equivalent for the property, or under such circumstances that the purchaser is not chargeable with notice of the fraudulent purpose of the partner

who is making the disposition, then the purchaser is not required to see that the partner does account to the partnership for the proceeds thus obtained by him; but when a partner disposes of the property of the partnership and obtains nothing, he can return nothing to the partnership, and one so dealing with a partner cannot shut his eyes to the transaction and say that he is innocent of any wrongful intention toward the partnership, and one who receives the partnership property from one partner for a past due debt to himself from that partner knows that the partner is not receiving anything that can be shared with the partnership and knows that he is thereby working a fraud upon the partnership. The transaction may be ratified by the partnership and may be validated, as one may elect to waive a tort and proceed in *assumpsit* as for goods sold, but until, with a full knowledge of all the facts, the partnership has ratified the transaction, it is voidable. When Thomas O'Brien received the orders from his son he knew the partnership was to receive nothing for them, and the transaction was fraudulent and voidable. If, however, the instruments so obtained by him are negotiable in the sense that promissory notes and bills of exchange are under the law merchant, he might sell or dispose of them to an innocent purchaser for value, who would obtain a good title to them as against all the world.

2. Nature of Partner's Interest.

Clements v. Jessup. 36 N. J. E. 569.

Clements purchased the interest of Shea in the firm property of Shea & Schnorr at a sale under an attachment in a suit against Shea on an individual debt. Thereafter, both partners executed a chattel mortgage on the firm property to Jessup, a firm creditor. The question is whether Clements' rights in the property should prevail over Jessup's.

Held, that the interest of a partner in partnership property is his right to share after payment of partnership debts, and therefore Jessup's right has priority.

Depue, J.

The interest of a partner in partnership property is only his share on a division of the surplus, after payment of partnership debts; and partnership property must be applied first to the payment of firm debts. A purchaser directly from a partner of his interest in the firm property acquires no title in partnership property except the vendor's share in the surplus after an accounting and adjustment of the partnership affairs. A sheriff having process of execution or attachment against one partner may seize and sell the latter's interest in partnership property; but a sale under such process will convey only the interest of the partner in partnership property after the firm debts are paid and the affairs of the partnership are settled up.

Indeed, partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent and had sufficient property remaining to pay the partnership debts. The appellant, by his purchase at the sale under the attachment against Shea, acquired, by virtue of the levy and sale under that proceeding, only the interest of Shea in the property, and the receiver's report shows that this property is required to pay the debts of the firm. In either aspect of the case, Jessup, as a partnership creditor, holding a chattel mortgage on the same property, executed by both partners for a firm debt, is entitled to priority, though his mortgage is subsequent in date to the attachment, if the property attached and sold was in fact partnership property.

Sometimes it happens that property which is in individual ownership is used for partnership purposes or in a joint adventure upon a community of profits, and it remains the sole property of the individual owner during the continuance of the partnership. In other words, there may be a partnership in the profits or in the business, and none in the property with which it is carried on. This condition of affairs arises generally where the property consists of lands used for partnership purposes, and less frequently with respect to chattels, such as office furniture or utensils of trade actually used by the firm. Cases of this description give rise to questions of considerable nicety, especially where the property consists of chattels necessary for use in the firm business, and the claims of partnership creditors are in the issue. This case, however, is free from all difficulty in that respect, for if one partner brings such property into the common stock as part of his contribution to the capital, it becomes partnership property.

The capital of a partnership, like the capital of a corporation, becomes firm property though it was once the property of an individual partner, and was put in *in specie*, and as such is liable to the payment of firm debts in priority over the debts of the individual partner, whose property it formerly was. Having become partnership property, it could not be taken out of the firm under any agreement to that effect relative to the dissolution, until the partnership debts were paid.

3. Property Acquired With Firm Funds.

Hunt & Co. v. Benson. 2 Humph. (Tenn.) 459.

Benson, a partner of the firm of Benson, Hunt & Company, used a portion of the profits to purchase a house and stock, to which he took title in his own name. In a suit for an accounting, the question arises whether the firm is entitled to profits from the property so bought or whether Benson is merely to be charged for the amounts so paid.

Held, that property acquired with partnership funds belongs to the firm.

Green, J.

There is no controversy but that where real estate is purchased for partnership purposes, and on the partnership account, no matter in whose name the purchase is made, and whether the legal title be in one partner or in all, equity deems it partnership property. The circumstance that the payment was made out of the partnership funds, in the absence of countervailing circumstances, will be decisive that it was intended to be held as partnership property. But if one partner withdraw funds from the firm and invest them in property in his own name, and for his own private benefit, under such circumstances of consent or knowledge and acquiescence on the part of the co-partners, as to amount to a contract, or loan, the property so purchased would not belong to the partnership, but would be the private property of the person so purchasing. On the other hand, although the partner may in fact purchase for his own use, and take the title to himself, yet if it be done under such circumstances that the knowledge and subsequent approbation of the co-partner cannot be implied, it may be regarded as partnership property, and taken into the account as such.

Now as Benson was to be entitled to one half of the profits, and be subject to half the losses and expenses from the commencement of the business until it should be discontinued, he could not, without the consent of his co-partners, withdraw any of the funds from the concern for private purposes, except to defray his necessary personal expenses.

In such a partnership as this, one partner cannot acquire an exclusive right to any part of the stock, until the partnership is settled and its debts are paid. Then he is entitled to his share of the surplus. For until the debts are paid, and the partnership is settled, each partner has an implied lien on the partnership property, as his indemnity against the joint debts, and his security for the ultimate balance due him. But if one partner without the knowledge or consent of his co-partners, may withdraw at pleasure what he may suppose will amount to his part of the profits, he may defeat his co-partner's lien, and leave him to pay the remaining effects of the firm. This cannot be done; and, therefore, unless Mr. Benson had the express or implied consent of his partners, to invest the joint funds in property for his private use and benefit, he cannot be permitted to withhold it from the account.

4. Property Contributed to Capital.

Taft v. Schwamb. 80 Ill. 289.

Taft, Schwamb and Crego formed a partnership to which Schwamb contributed a building and machinery. The building

was destroyed by fire and rebuilt with partnership funds. After dissolution, this bill is filed to determine upon whom the loss should fall.

Held, that property contributed to firm capital belongs to the firm, and therefore its loss is to be borne in the proportion in which each partner shares losses.

Scholfield, J.

The principal question to be determined in the case before us is, Upon whom shall the loss, in consequence of the destruction of the building, machinery, engine, boiler, tools, etc., mentioned in the articles of co-partnership as delivered in as capital stock by Schwamb, fall? Upon Schwamb alone, or upon the parties in the proportion they are to share profit and loss? The latter was the conclusion of the court below; but appellants insist that the former is the basis upon which the account should have been stated.

It would, in our opinion, be difficult to employ language more clearly indicating that the "building, machinery, tools," etc., etc., became the property of the co-partnership, and ceased to be the individual property of Schwamb, than that employed in the articles. It was delivered in as "capital stock." What is "capital stock," in the sense in which the words are here used? Unmistakably, the capital or property of the co-partnership. The total capital stock represents everything of value belonging to the co-partnership, and it is therefore impossible that property delivered in as "capital stock" could be anything else than co-partnership property.

It is undoubtedly true that the partners may, by contract, stipulate that the ownership of property may remain in one, while the partnership shall have only the use of the property, or make any other regulation, as between themselves, they may choose, in regard to the ownership of property used in connection with the business of the co-partnership, not prohibited by law; but the present case is unaffected by any such stipulation. The stipulation here, by making the property "delivered in" by Schwamb "capital stock," excludes the idea of a reserved ownership in him, and only a mere right to use the property by the co-partnership.

5. Property Owned by Partners Individually.

Marcus v. McFarland. 119 Md. 269.

McFarland, to whom had been assigned the right to use the name, "Henry Marcus & Son," by the members of that firm, of which both he and the plaintiff Marcus had been partners, entered a new partnership with the plaintiff, and agreed that the name might be used for partnership purposes as long as the new firm should continue. After dissolution of the new firm, Marcus

brings an action to restrain McFarland from using the name, "Henry Marcus & Son."

Held, that a partner may contribute property to the use of the partnership without destroying his own title.

Pattison, J.

It was clearly within the power of the plaintiff, upon the dissolution of the firm in 1906, to sell and assign unto the defendant the good will of the firm, together with the right to use the firm name, and under said agreement the defendant acquired a valuable right, a right that could be exercised by him to the exclusion of the plaintiff until by some act of his this right was lost to him.

Whether personal property which is owned by one of the partners, when the partnership is formed and which is used thereafter for the firm's purposes, has been contributed to the firm's capital and has thus become the firm property, or remains the individual property of the said partner, is to be determined by the partnership agreement and conduct of the parties thereunder.

Applying this rule, we are to ascertain whether or not this valuable right of the defendant to use the firm name of "Henry Marcus & Son" became the property of the newly created firm, because of the formation of such new firm and the right extended to it to use said firm name for the period stipulated in the agreement, or until sooner dissolved.

We find nowhere in the partnership agreement or in the conduct of the defendant anything to indicate that it was his intention to divest himself of this right and to contribute it to the capital of the firm. The right to use the firm name at the time of the formation of the co-partnership of 1909 is not questioned, and this right remained in him, subject only to the permission granted by him to the new firm to use it during the period of such co-partnership and no longer.

6. Title to Firm Real Estate.

Kentucky Block Cannel Coal Co. v. Sewell, 249 Fed. 840.

The plaintiff brings an action to determine the title to certain land. The main issue is whether a deed to "J. W. Sewell & Co." passed title to the members of that firm.

Held, that when real estate is deeded to a partnership, the partners take title as tenants in common.

Knappen, Cir. J.

The deed to J. W. Sewell & Co. vested the legal title in the partners as tenants in common. A deed to a co-partnership in its firm name is not for that reason void. The modern authorities are practically uniform to the effect that a conveyance to a firm in its

firm name passes to some one the legal title to the land, as real estate. Partnership real estate is now regarded in equity as personalty only for the purpose of subjecting it to the payment of debts and adjustment of balances between partners; and in the absence of debts the partners have a right to personally divide the land between them as real estate, or to convey their respective interests therein, subject to its being needed to pay creditors or adjust balances between partners.

The principle is universally recognized that at law real estate owned by a partnership, even if purchased in the name of the partnership, and with partnership funds, is held by the members of the firm as tenants in common.

Had the conveyance been to Sewell & Sewell, each would have taken legal title to one-half the property. Defendants do not dispute this proposition. A conveyance to a firm, consisting of a surname followed by the words "and Brother" or "and Son," passes the legal title as tenants in common to those conforming to such designation and shown to be actually members of the firm.

Defendants contend, however, that where the firm name contains the surname of one or more, but not of all, the partners, followed by the words "and Company," a conveyance of real estate to the partnership in such firm name vests the legal title in the partner or partners whose surnames so appear, in trust for the firm. Several cases declare this distinction. The basis on which decisions of this nature rest seems to be that the word "Company" contains no certain designation of any other person than the one whose surname is given. We are unable, however, to see any logical distinction between the case where the surnames only are given, or where one surname is followed by the words "and Son" or "and Brother" and a firm name consisting of one surname, followed by the words "and Company." In neither case is there a certain designation of all the members. In either of the first-mentioned cases there is an ambiguity to be solved by parol testimony, not only as to the full name of the partner whose surname alone appears, but also as to the identity of the specific "Brother" or "Son"; and the difference between supplying by parol the partners' names in those cases and in that where it is represented by the words "and Company" is wholly unsubstantial.

7. Nature of Partnership Real Estate.

Woodward-Holmes Co. v. Nudd. 58 Minn. 236.

Woodward and Nudd were partners. Upon dissolution, they sold partnership real estate to the plaintiff corporation, which brings this action against Mrs. Nudd to determine her right to dower in that real estate.

Held, that there is no right to dower as long as partnership real estate belongs to the firm.

Mitchell, J.

It is well known that the English doctrine was that partnership real estate is considered as personal property for all purposes. The doctrine of the American courts on the subject is more restricted. Some of the earlier decisions in New York and Massachusetts went almost to the length of entirely subverting the equity doctrine prevalent in England; but the other American decisions are not inconsistent with the more correct and improved view of the English law. It is now held with practical unanimity by the American courts that, if partnership capital be invested in land for the benefit of the company, all the incidents attach to it which belong to any other stock, so far as consistent with the statute of frauds and the technical rules of conveyancing, and that it will be treated as personal estate until it has performed all its function to the partnership, and thereby ceases to be any longer partnership property, and until then it is not subject to either dower or inheritance, but that, after all the purposes of the partnership have been thus accomplished, whatever land remains in specie will be regarded as real estate. The question is, At what precise moment is it reconverted into real estate, or, to speak more accurately, does it resume all the attributes and incidents of real property? We think the answer is, the moment the partnership is terminated and wound up by judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. When a partnership is dissolved, and its affairs wound up and completely ended, and any land remains in specie, unconverted, this must be deemed a determination that it is no longer a part of the co-partnership stock, and election to hold it thereafter, individually, as real estate.

During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whatever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property; for otherwise the business of the firm might be stopped, by reason of the wife of one of them refusing to join in the conveyance or mortgage.

They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its functions as personalty, or ceased to be partnership property. And what the partners may thus do voluntarily the court may do for them, in an action brought to dissolve the partnership and wind up its affairs.

The error which lies at the foundation of the whole argument of defendant's counsel is in the assumption that, at the time of the purchase of this property, it became the individual real estate of the husband, and that the inchoate right of the wife under the statute immediately attached, subject only to a lien for the payment of partnership debts. This is not correct, and none of the authorities

that we have found so hold. The fact is that only so much of it becomes the individual real estate of the partner as remains in specie, unconverted, after all the purposes of the partnership have been entirely fulfilled, and it is only to such of it that any inchoate interest of the wife ever attaches.

8. Title to Firm Personality.

Hendren v. Wing. 60 Ark. 561.

Miller executed a mortgage on a boiler and engine to Wing's firm, under the name of "Arkansas Machinery & Supply Company," not specifying the individual names of the partners. Hendren seized the boiler and engine upon a claim against Miller, and the Supply Company seeks to recover the property. The defense is that the mortgage to the Supply Company was not made in the name of any person.

Held, that a firm may take title to personal property in its firm name.

Riddick, J.

The Arkansas Machinery & Supply Company is not a corporation, but it is the business name of a firm of partners. The question for us to determine is whether a chattel mortgage, executed to it as such partnership, is valid at law. The decisions in regard to transfers of real estate to partnerships are based on the old rule that "a partnership, as such, cannot at law be the grantee in a deed, or hold real estate." This rule does not apply to personal property. On the contrary, a partnership, as such, can at law be the vendee in a bill of sale or other conveyance of personal property. The custom of the country teaches us that this is so. The business of the country is largely carried on by partners under partnership names, which frequently do not contain the name of any person. Vast quantities of personal property of all kinds are contracted for, bought, and sold by such firms under their firm names each year, and their right to thus buy and sell goes unchallenged. A consideration of this fact shows that there is a wide distinction between the rights of partnerships at law in regard to the buying and selling of personal property and the restrictions which prevail there in regard to transfers of real estate.

9. Good Will as Firm Property.

Rowell v. Rowell, Adm. 122 Wis. 1.

John S. Rowell conducted a manufacturing business with successive partners, including Ira Rowell, through whom the plaintiffs claim. After the death of Ira Rowell, John S. Rowell

formed a corporation which took over the assets and continued the business. The plaintiffs seek to recover Ira Rowell's share of profits realized by the corporation from the use of the assets of the old partnership, and contend that the good will should be considered as one of those assets.

Held, that good will is a firm asset, to their share of which the heirs of a deceased partner are entitled.

Dodge, J.

That the somewhat indefinite and quite intangible thing or conception known as "good will" belongs to the association of individuals conducting a business, and, if of money value, is an asset of the association, is hardly open to question now. From such ownership results the duty of either administrator or surviving partner to exercise due diligence to obtain for such asset, like any other, the best possible price, and to account for it if lost or misappropriated. That John S. Rowell did take to himself, in his new concern, whatever of good will the old firm had, cannot be doubted. Every class of property and method of doing business which could serve to suggest successorship, continuance of the same enterprise, was appropriated, except the exact firm name, and the public, as also the selling agents, were notified expressly, by letterheads and otherwise, of such successorship; that the new name meant only the old business. Indeed, all this is not seriously controverted by appellants. Their contention is that, in valuing the good will, much has been included which did not legally inhere therein, and many rights which, after a sale of that firm asset to a stranger, would have remained with John S. Rowell and his sons, and would have rendered any salable good will of little or no value, have been overlooked. They contend that the only good will with which John S. Rowell can be charged is that which a court or an administrator hostile to him could have sold to a stranger without his consent and in hostility to his legal rights. This contention is in general sound, and invites investigation whether the court has gone astray in the respect claimed.

Just what "good will" includes is not easy of definition. Nay, it varies with the customs of the general trade and the character or methods of the particular business. An early definition by Lord Eldon is "the probability that the old customers will resort to the old place." This involved the ancient idea that good will inhered in the premises where the business was conducted, which had some jurisdiction when considering an inn, tavern, or theater, as in most of the early cases. This, however, is too limited for modern kinds or methods of business. The habit of people to purchase from a certain dealer or manufacturer, which is the foundation for any expectation that purchases will continue, may depend on many things besides place. Confidence in the quality of the goods, in the facilities of the establishment to fill orders promptly, or in the personal integrity or skill of a dealer or manufacturer, familiarity of the public with a

designating name for the product, and probably many other circumstances, might be mentioned as illustrative. The good will is a sort of beaten pathway from the seller to the buyer, usually established and made easy of passage by years of effort and expense in advertising, solicitation and recommendation by traveling agents, exhibition tests or displays of goods, often by acquaintance with local dealers who enjoy confidence of their neighbors, and the like. In many instances it costs a large sum, and is valuable as it relieves from a continuance of the above suggested exertions, at least in any such degree as would be necessary to establish a new concern on a parity. In an attempted transfer of this asset to a new concern, many things assist in greater or less degree to make that attempt effective and the good will valuable. The right of the buyer to hold himself out as succeeding to the former business, to use the old business name, the same kind of advertising matter, stationery, and the like; the ownership of old patterns and patents, so that the product of a factory may be identical in all parts after the transfer; also the right and opportunity to continue at the same town, to have access to and use of the records and files of the old establishment, and thus to avail of the forces of momentum and inertia effective in psychological as well as physical affairs; all these and many other things are important and serve to enhance the value of the good will, especially where they are acquired to the exclusion of any other person. So the absence of any of these rights, or the right of others to share them, is an impairment of the value of the transferable good will, and in probably greater degree an obstacle to finding a customer for so intangible and speculative an asset. A living person *sui juris* in selling the good will of his own business may assure that good will in all of the above respects, and may disable himself from doing any act to impair its value; but every man, and not the less a surviving partner, has certain rights which he did not forever surrender upon entering the partnership, and which cannot be taken from him without his consent. Among these is the use of his own name to designate himself as an individual in whatever business he may engage. The law does not make a man anomalous merely because he was once in a partnership using his name as a part of the firm name. John Smith is still John Smith after such an event. He may sign his letters so, he may bill goods to customers, he may declare by sign or legend in that name that he is the owner or the maker of the goods he offers for sale, so long as there is nothing to deceive the public into the belief that he is still conducting the old establishment or business. Obviously, therefore, if in a given case the good will of a business were dependent entirely on personal acquaintance with or confidence in an individual, the sale value of that good will would be slight, if that individual were to sever from it and engage in sale of the same articles. So, again, if the product of a manufacturing business depended for its utility or popularity upon patents, a transfer might be of little value to one who could not use such patents.

The general rule may be stated that so far as a firm name serves

to designate the establishment, and not merely existing individuals, it belongs to the partnership, and can be transferred to a stranger purchasing the business. So far as that name merely consists of the names of existing individuals, there is not such property in it as to prevent the surviving or outgoing partners from using their own names to describe themselves in a new business—so long as they do not, either by the structure of a new firm name or otherwise, convey the idea of their identity with or succession to the old concern. Meanwhile the successors to the old business must not, without express agreement, so use the old firm name as to convey the idea that the retiring individuals are still connected with it. This rule was originally put on the ground that thereby pecuniary liability might fall upon the retiring partner, but other grounds of equal importance support it—such, for example, that his reputation may suffer by reason of inferiority of goods or dishonorable business conduct, to which he is thereby made ostensibly a party. There are, of course, multitudinous varieties of firm names to which the foregoing rule is not applicable, as where some arbitrary or fancy name is used, which does not naturally describe any individual; where the name or names of individuals have continued to be used after their death, so that the name does not designate any existing individual, and has practically become an artificial one, designating nothing but the establishment. In such cases the right of succession to the business and good will usually carries the exclusive right to use the old firm name, but they are not applicable to the situation in the instant case.

B. Relation of Partners to Third Persons.

1. Power of Majority of Partners to Bind Firm.

Johnston & Co. v. Dutton's Adm'r. 27 Ala. 245.

Johnston, Fogg, and Vanderslice composed the firm of Johnston & Company, engaged in the business of running a saw mill. Johnston gave public notice that he would no longer be bound by any contracts made on account of the firm without his consent. Thereafter, Fogg, without Johnston's consent, gave notes in settlement of firm accounts. Johnston contends that he is not liable on them, as Dutton, the holder, had notice of Johnston's refusal to be bound.

Held, that a majority of the partners may bind a dissenting partner within the scope of the partnership business.

Goldthwaite, J.

It is to be observed that, in the present case, the contract was concurred in by two members of the firm; and the question, therefore,

is as to the right of the majority to bind the other partners, against their dissent, as to matters appertaining to the common business, and in the absence of any stipulation conferring that power in the articles of co-partnership. This question is a new one in this court, and indeed we have found no case in which it has been expressly decided. Both in England and the United States there are cases which assert the general proposition that a partner may protect himself against the consequences of a future contract, by giving notice of his dissent to the party with whom it is about to be made. And where the firm consists of but two persons, and there is nothing in the articles to prevent each from having an equal voice in the direction and control of the common business, the correctness of the proposition cannot be questioned. In such case, the duty of each partner would require him not to enter into any contract from which the other in good faith dissented; and if he did, it would be a violation of the obligations which were imposed by the nature of the partnership. It would not, in fact, be the contract of the firm; and the party with whom it was made, having notice, could not enforce it as such. So, if the firm was composed of more than two persons, and one of them dissented, the party with whom the contract is made acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the articles, or from the nature of the partnership contract. All the cases can be sustained on this principle; and it is in strict analogy with the civil law, which holds where the stipulations of the partnership expressly entrust the direction and control of the business to one of the partners, that the dissent of the other would not avail, if the contract was made in good faith; and such also, we think, is the rule of the common law. Were it otherwise, it would be denying to parties the right to make their contracts. If our views as to the governing force of express stipulations are correct, the effect of such terms or conditions as result by clear implication from the articles, or arise out of the nature of the partnership, must be the same. It is as if they had been expressly provided.

Now, whenever a partnership is formed by more than two persons, we think that, in the absence of any express provision to the contrary, there is always an implied understanding that the acts of the majority are to prevail over those of the minority, as to all matters within the scope of the common business. The rule is certainly more reasonable and just than to allow the minority to stop the operations of the concern, against the views of the majority. We do not say that it would be deemed a bona fide transaction so as to bind that firm, if the majority choose wantonly to act without information to, or consultation with, the minority; but when, as in the present case, the one partner has given notice, and expressed his dissent in advance, there could be no reason or propriety in requiring him to be consulted by the other two.

We do not consider the cases holding that one partner has the right at pleasure to dissolve a partnership, although the articles provide that it is to continue for a specified term, as having any

bearing on the case under consideration. Conceding they are law—which is doubtful—the decisions rest solely upon the ground that the limitation on the right of dissolution is incompatible with the nature of the co-partnership contract; and this principle does not militate against the positions we have asserted. The dissent, in the present case, cannot be regarded as a dissolution; for, if effectual, it would not necessarily produce that result, although it might operate to change the mode of conducting the business. In other words, it might be carried on without contracting debts.

Our conclusion is, that the act, being concurred in by two of the partners, was, under the circumstances, the act of the firm; and that the charge, asserting the proposition that the dissent of one partner against the other two would necessarily exonerate him, was properly refused.

2. Firm Liability That of Principal.

Burgan v. Lyell. 2 Mich. 102.

Burgan rendered services to the defendants, who were partners under the name of the United States Mining Company. Burgan was employed by Harvie, a member of the firm, who, by an express provision of the articles of partnership, was forbidden to make such a contract of employment. After the services were rendered, Burgan received from the defendants' superintendent a certificate showing the amount due him, upon which Winder, another member of the firm, paid him forty dollars. He now sues for the remainder.

Held, that third parties are not bound by secret limitations upon a partner's authority.

Pratt, J.

It appears that Andrew Harvie, a member, and one of the managers of the company, employed the plaintiff to perform the work in question. But whether his powers, as one of the managers of the company, were general, or special and limited, does not appear; nor is it material to a judicial determination of this cause, as every member, in legal contemplation, without any special powers being conferred upon him, by the articles of co-partnership is not only a principal of the firm, but a general agent for all the co-partners in the transaction of their legitimate company business, each member being vested with power which enables him to act at once as principal; and all are regarded as being present and sanctioning the engagements and contracts which they may singly enter into within the scope of their partnership matters. Harvie, then, being one of the partners, was vested with the right of contracting with the plaintiff, and any work performed by him for the company, under the contract, would legally bind all of the partners for the payment of it. Although

Harvie, as a single member, was inhibited from making such a contract by some express provision of the articles of co-partnership, still the rights of third persons, to whom such provision was unknown, would not be thereby affected; nor would it tend in the least to bar a third person, who had by the procurement of a single member, without notice, rendered services for the company, in recovering therefor in a suit against all.

It is a well settled principle of law that the acknowledgment by one partner, during the continuance of the partnership, of a debt as due by the partnership, will amount to a promise binding on the firm. The certificate of the superintending agent, and the recognition of the account by a member and one of the managers of the company, constitute sufficient evidence of such acknowledgment. And so a part payment of a debt of a firm by one partner, during the continuance of the partnership, will not only extinguish *pro tanto* the partnership debt, but will operate as an admission of the existence of the residue of the debt, binding on all the partners.

These are rules of law about which there has never been any disagreement, either by legal authors or courts of last resort; and by them all the members of this company are equally liable to the plaintiff for the payment of the balance due him on the account.

3. General Powers of Partner.

Salt Lake City Brewing Co. v. Hawke & Andrews. 24 Ut. 199.

The Brewing Company sues the defendants as partners to recover money lent Hawke by the plaintiff for the purpose, as alleged, of cashing checks at the saloon which the defendants operated. Hawke absconded with this money, and the plaintiff seeks to hold Andrews, the other partner.

Held, that all partners of a trading partnership are bound by the act of one partner in borrowing money ostensibly for trade purposes.

Bartch, J.

From the facts and circumstances shown by the evidence, it seems clear that Hawke had implied authority to transact all the legitimate business of the firm, and to bind the firm within the scope of such business, and that the firm was bound by the transaction in controversy. The law is well settled that, in a trading partnership, a partner may enter into any contract or engagement for the firm in its ordinary trade and business, and may buy, sell, or pledge goods, borrow money, or do any other acts incident or appropriate to such business, according to the ordinary course or usages thereof, and, as between the firm and those dealing with it in good faith, without notice, it is not material whether or not such partner is acting fairly with his co-partners in a particular transaction, so long as he is acting

within the scope of the firm's business and of his authority. When, therefore, as is indicated by the evidence in this case, money is borrowed by one member of a firm on the credit of the firm, according to the usual course of its business, and within the general scope of its authority, the partnership is liable therefor. Nor, where a transaction of one partner is for the firm and within the general or apparent scope of the partnership business, is it a matter of any consequence that the writing evidencing the transaction is signed with the name of the individual partner only.

4. Distinction Between Trading and Non-trading Partnership.

Pease v. Cole. 53 Conn. 53.

Cole & McCarthy were partners conducting a theater in Hartford. McCarthy gave a firm note to his father for money which he borrowed. The note was transferred to the plaintiff Pease as a holder in due course, who now seeks to hold Cole upon the note. Cole defends on the ground that McCarthy had no authority to borrow money in the firm name.

Held, that a partner in a non-trading partnership has no implied authority to borrow money.

Loomis, J.

The finding in terms excludes all express authority of the other partner, and even all knowledge of the matter on his part. So that any conclusion that the note is the note of the firm rather than of the member executing it, must necessarily rest on an authority to be implied.

The circumstances from which an authority may be implied are identical with those involved in a question of ordinary agency, for each partner is regarded as the accredited agent of the rest.

In many cases the decisive fact is found in the customary course of dealing, but not so here, for it is found that the note in question was the only note ever given in the name of the firm.

The only remaining source from which an authority may be derived by implication must be sought in the nature and scope of the partnership and in the nature of the act. And here, if we examine the legal principles that are applicable, it will be found not only that all such implication is wanting, but that the presumption is directly against the authority assumed. The weight of authority in the United States and the uniform tenor of the authority in England will be found to establish a controlling distinction in respect to implied authority between commercial or trading and non-trading partnerships.

In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within

the scope of its business, and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions.

But when we pass to non-trading partnerships the doctrine of general agency does not apply, and there is no presumption of authority to support the act of one partner. Hence, in order to subject the firm upon a bill or note executed by one partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his co-partners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it.

That the partnership in question belongs to the non-trading class seems so obvious as to need no discussion.

5. What is a Trading Partnership.

Marsh v. Wheeler. 77 Conn. 449.

Marsh, a member of the firm of Wheeler & Company, plumbers, signed notes payable to the order of Marsh Brothers, a firm of which he was also a member. Marsh had no authority to execute the notes, nor was there ratification. This action is brought by the bank at which the notes were discounted against Wheeler, who denies liability on the ground that Marsh had no authority to sign negotiable instruments in the name of the firm.

Held, that the authority of a partner in a trading firm includes the making of firm paper.

Prentice, J.

Upon the question of implied authority the defendants rely upon the distinction between commercial or trading and non-trading partnerships, and the further distinction between the two classes of partnerships, in that the power of one partner to pledge the credit of the partnership in the emission of commercial paper is presumed with respect to trading and not presumed under ordinary conditions with respect to non-trading partnerships. So far there is no difference between the parties as to the law, and the question of implied power resolves itself into the narrow one as to the class of partnerships to which that of Wheeler & Company belonged, to wit, whether it was a trading or non-trading one.

A trading partnership is one which buys and sells; but buying and selling need not be its sole purpose, nor even its most characteristic feature. A partnership for the conduct of a manufacturing or mechanical business is none the less a trading one for the reason that buying and selling in the market is only one of its incidents.

But in whatever language the distinction between the two classes of partnerships is expressed, it is not to be forgotten that it is not a purely arbitrary one, but has an underlying reason and purpose which should not be overlooked when an application to any given situation is attempted. This reason and purpose have their origin in a need on the part of certain partnerships arising out of the kind and manner of their business, and the absence of such need on the part of others, and in the interest of the commercial world into contact with which the business of the one class brings it and that of the other does not. So it is with respect to those partnerships, the nature of whose business naturally comprehends certain courses of dealing, that the law says that they belong to the class denominated commercial or trading. These are those whose conduct so involves buying and selling; whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which in their character and incidents are like those of traders generally.

It appears that the firm carried on a business which contemplated frequent and extensive purchases, not as incidental to an occupation or for use, but for the distinct purpose of selling again in an adapted or applied, if not the original, shape; and that its business, therefore, carried it frequently into the market and brought it into contact with the commercial world in transactions naturally involving the use of credit and the usual instrumentalities of trade. Its business being one of such a character, it was a commercial or trading partnership within the meaning of that term as used in this connection.

6. Power to Sell Real Estate.

Robinson v. Daughtry. 171 N. C. 200.

Lowe, a member of the firm of Robinson & Company, sold land belonging to the partnership to Daughtry, giving him a deed signed in the name of Robinson & Company. The plaintiffs, the other members of the firm, contend that this deed conveyed only Lowe's interest in the property, and seek to recover the remainder from Daughtry.

Held, that while one partner cannot give a deed to firm property, he may make a contract to convey it.

Allen, J.

Ordinarily [the] authority of one partner to bind the others on the ground of agency does not extend to the conveyance of real property, and deeds conveying such property must be executed by all the partners; but it is also true that an instrument in form a deed, which has been defectively executed by an agent having authority,

may operate as a contract to convey, and that no seal is necessary in a contract to convey land, and that the authority to make the contract may be shown by parol.

Applying these principles to the facts, it follows that the paper writing executed by the partner, Lowe, in the name of the partnership, is valid as a contract to convey, provided there is evidence of authority in Lowe to make the contract.

This authority may be express, or implied from the nature of the business conducted by the partnership. The plaintiff testified that Lowe had charge of the business of the partnership in Sampson County, and that it was entirely in the scope of the business to take land and convert it into cash in exchange for patent rights; and when the character of the business is considered, this furnishes evidence of authority in Lowe to make a valid contract of sale binding on all the partners.

"In so-called real estate partnerships where land is the commodity dealt in, it would seem that there should be an implied power in each partner to sell it. A distinction should be drawn between the actual conveyance of firm realty and a contract to convey. It might very well be that a partner has power to bind the firm by an agreement to convey partnership land, but has not the power to execute the formal conveyance."

7. Power to Execute Instrument Under Seal.

Pierson & Pierson v. Hooker. 3 Johns. (N. Y.) 68.

The plaintiff firm sue Hooker on a bill of exchange drawn in their favor. The defense is a sealed release executed by one of the firm. The Piersons contend that one partner has no authority to release a firm debt without authority from the other partners.

Held, that one partner may execute a release of a firm debt without express authority from the others.

Kent, C. J.

It is again said, that one partner cannot bind another by deed. This, as a general position, is correct; but it does not apply to the case before us. Here was no attempt to charge the partnership with a debt by means of a specialty, but it is the ordinary release of a partnership debtor. It is a general principle of law, that where two have a joint personal interest, the release of one bars the other; and I cannot perceive that the case of co-partners in trade forms an exception to the general rule. Each partner is competent to sell the effects, or to compound, or discharge the partnership demands. He is to be considered as an authorized agent of the firm, for all such purposes. Each has an entire control over the personal estate.

8. Power to Assign for Creditors.

The H. B. Clafflin Co. v. Evans. 55 Oh. St. 183.

Snodgrass Brothers, a trading partnership, became insolvent and J. F. Snodgrass, the managing and only partner within the state, made an assignment for the benefit of creditors. This action is brought by general creditors against the assignee in insolvency to determine the right of one partner to make an assignment without the assent of the other.

Held, that while a partner may not make an assignment without the consent of the other active partners, the rule does not apply when he is the only partner conducting the business.

Williams, C. J.

The validity of the assignment is questioned on the ground that, though executed in the name of the firm, it was so executed by one of the partners only, and without having obtained the consent of the other.

[It has been held] that one member of an insolvent firm cannot make a valid assignment of the partnership effects to a trustee for the benefit of its creditors, against the expressed will of a co-partner, or without his assent when he is present or accessible.

That decision is placed upon the ground that the appointment of a trustee to dispose of the effects of the firm for the benefit of its creditors, is not within the contemplation of the ordinary partnership, or the usual course of its business, and therefore [is] beyond the scope of the agency arising from the partnership relation. The contrary doctrine is maintained by high authority, and with much show of reason. It is not doubted that one partner may sell any part of the partnership property to one or more of the creditors in payment of the partnership indebtedness, or sell all of its effects to all of its creditors, and if insufficient to satisfy their debts in full, the sale may be so made to them as to secure a *pro rata* division; and it is not surprising that authorities are found which strenuously maintain that the power of the partner to accomplish the same result by an assignment to a trustee to make such distribution is included in the agency resulting from the partnership relation. The dissolution of the partnership ensues not less certainly from a sale of the whole of its effects directly to the creditors, than from the transfer to a trustee for their benefit. But we are not disposed to depart from the rule nor are we disposed to extend it. It does not apply where the partner whose assent has not been obtained to the assignment was not accessible in the exigency which seemed to call for immediate action; nor, where his authority or assent may be fairly implied from the situation of the parties, or the manner of conducting the business. In [a] case [cited], the partner whose assent was lacking not only resided in the city where the partnership had its place of business, but he was the

active managing member of the firm, having control and management of its property and business. The circumstances were such as to repel rather than give rise to any inference of authority or assent by him to a final disposition of the firm effects by his co-partner who had taken no active part in its affairs. The situation is reversed in the case we have before us. Here, the partner who executed the assignment was the active managing member of the firm, having the entire charge and control of the partnership business and custody of its property; and it is plainly inferable from the permanent absence of the other partner, and his total inattention to the business, that he intended to entrust the affairs of the firm wholly to the resident partner. The absent partner having withdrawn from participation in the conduct of the partnership affairs, and, being inaccessible for consultation and advice, might reasonably expect and be held to intend that the member placed in control should not only exercise the implied powers of agency ordinarily possessed by a partner, but, in addition, should have the discretionary power in case of emergency to do what, under the circumstances, should appear to be just and proper in the disposition of the firm property. And, where a commercial house so situated is overtaken by financial distress amounting to obvious insolvency, the authority of the acting partner to appropriate the property to the creditors equally, by placing it in the hands of a trustee for that purpose, may be presumed, in the absence of express dissent by the co-partner, or of circumstances which would fairly indicate his dissent. Equality among creditors of equal merit is favored in equity, and accords with natural justice; and a disposition of the partnership assets, in case of insolvency, which secures that equality, the courts will not be eager to disturb.

9. No Power to Submit Firm Claim to Arbitrator.

St. Martin & Co. v. Thrasher. 40 Vt. 460.

St. Martin & Company sue for work done under a written agreement. The defense is that the amount due is conclusively settled by an award of Hale, to whom the dispute was previously submitted for arbitration with the concurrence of St. Martin's partner. St. Martin never agreed to a final award by Hale.

Held, that a partner has no implied authority to submit a firm claim to arbitration.

Peck, J.

The question is whether one partner, by virtue of his relation as partner, has authority to bind his co-partners by a submission of a co-partnership matter to arbitration, so as to make the award in pursuance of such agreement binding on the firm. We think that upon principle, no such power is implied from the co-partnership relation. The exigencies and convenience of business do not require

a partner to possess such power. It has been decided in this state that one partner has no authority by virtue of the relation of partner, to accept service on a writ for himself and partner. The reason seems to be quite as strong against the power of a partner to create a court and bind his co-partner by the decision; since the very foundation of an award is the agreement of submission. The case therefore must be decided on its merits unaffected by the award.

10. No Power to Guarantee Debt of Another.

Persons v. Oldfield. 101 Miss. 110.

Ruggles, a partner of Persons in the firm of Ruggles & Co., guaranteed in the firm name payment for material ordered by Adams Brothers from Oldfield, who now seek to hold Persons upon the guaranty.

Held, that a partner has no authority to guarantee the debt of another.

McLean, J.

The authority of one partner to bind his co-partner is placed solely upon the ground of agency, and hence one can bind the other only within the scope of the agency. A partnership is organized to conduct the business for the benefit of its members, and it is foreign to its business to become surety for the members of the firm (unless this is the business in which the firm is engaged), or responsible for the debts of the individual members of the firm. This is elementary. It is doubtless true that, when the firm's name is found upon commercial paper, *prima facie* the firm is bound. But this casts upon the party attempting to escape liability only the burden of showing that the party signing the name of the firm had no power so to do.

It was held at an early date in this state that where one of two persons subscribes the partnership name to a note as surety for a third person, without the authority or consent of the other partner, the latter is not bound, and it lies upon the plaintiff to prove the authority or consent of the other partner. And the rule has never been departed from. The same is true in Alabama, wherein it is held that one partner cannot bind his co-partner by signing their names as sureties in a note, nor can he draw, indorse, guarantee, or accept in the firm name a note or bill of exchange for the benefit of a third person; and where it appears that he has thus used the partnership name, it devolves upon the party who seeks to enforce such a security to show that the transaction was sanctioned by the inactive partner. And it may be said that this is the law in all other states.

The correspondence shows that Ruggles & Co. became the mere surety of Adams Brothers, without the knowledge or consent of Persons. Therefore, *prima facie*, the non-consenting partner is not liable.

11. Powers of Partners Under Uniform Partnership Act.

Laws of New York, 1919. Chapter 408. Article 3.

Section 20. Partner agent of partnership as to partnership business.

1. Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

2. An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

3. Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

- (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,
- (b) Dispose of the good-will of the business,
- (c) Do any other act which would make it impossible to carry on the ordinary business of the partnership,
- (d) Confess a judgment,
- (e) Submit a partnership claim or liability to arbitration or reference.

4. No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction.

12. Assent of Firm to Act Otherwise Beyond Powers of Partner.

Erdman v. The Trustees of the Eutaw Methodist Protestant Church. 129 Md. 595.

The Church sues Erdman, the surviving partner of the firm of Erdman & Son, on a note executed in the firm name in behalf of a deceased partner as a personal subscription. The defendant knew of the subscription and assented thereto.

Held, that while a partner has no authority to issue firm paper for a personal debt, the firm may be bound if the other partners assent thereto.

Briscoe, J.

The general rule, apart from the statutes of the several states, is to the effect that a partnership note given in payment of the individual debt of one of the partners is binding on the partnership, if the note is given upon the authority of the other partners or they acquiesce or recognize it as an obligation of the firm.

If the partner dealing on individual account delivers a promissory note of the partnership in payment of his private debt, this of itself carries notice to the party receiving it that it is a partnership security. Such transactions at once convey notice, and devolve upon the individual creditor seeking the benefit of such agreements, the burden of showing that the other partner or partners authorized or assented to what, without proof of such authority or assent, would clearly appear to be a misappropriation of the partnership funds, and therefore a fraud upon the partnership. This is both in accordance with the dictates of common sense and of settled judicial decision. The question of the authority or assent of the other members of the firm to the transaction involved, is one for the jury; and it should be submitted upon proper instructions from the court.

Where a partner gives the partnership name for his individual debt, the assent of his co-partners to the act or their ratification of it may be implied from circumstances, and need not be proved by express agreement. Nor need there be any new and independent consideration for the act of the partners ratifying and promising to be bound by the act of a co-partner who has wrongfully used the partnership name for his own benefit.

In the present case, the defendant not only assented to the giving of the partnership note in payment of the father's debt, but he actually drew and signed the note himself and delivered it to the treasurer of the church. He afterwards, after the death of his father, recognized it as a debt of the firm by the payment of one year's interest on it.

13. Liability of Firm for Torts of Partner.

Page v. Citizens Banking Co. 111 Ga. 73.

Page sues the partners composing the Citizens Banking Company for malicious prosecution arising out of the arrest of Page upon charges by three members of the firm that he was concealing stolen property. The question concerns the extent to which other partners are liable for a tortious act of one partner.

Held, that when one partner acts for firm purposes in the commission of a tort, the firm will be bound.

Cobb, J.

One partner may be rendered liable for the acts of his co-partners. Whether or not he is so liable is to be determined by the

application of the rules governing the relation of principal and agent; and generally the partnership is liable for the act of one of the partners if it would have been liable had the same act been committed by an agent entrusted by the firm with the management of its business. If a tort be committed by one partner while engaged in a transaction within the scope of the partnership business, and such tort be committed in furtherance of the interests of the partnership, it will be liable. But it will not be liable for a tort committed by one partner in a transaction outside of the partnership business, where he acts from his own private malice or ill will, unless the act which constituted the tort was authorized by the members of the partnership or subsequently ratified by them, the act itself having been done in their behalf and interest. The authorities establish simply that as a partnership is an aggregation of individuals, where each one is the authorized agent of the others to perform any act within the scope of the partnership enterprise, if one of them in the prosecution of the business of the partnership be guilty of a wilful wrong toward another, the other partners will be liable; and that if one partner is guilty of an act outside of the partnership business, which causes any injury, the other partners will not be liable unless it appear that such act was expressly authorized by them, or after the same had been performed in their behalf and interest they had either expressly ratified the same, or knowingly received the fruits of the wrongful act.

14. Liability of Firm for Torts of Partner.

Boston Foundry Company v. Whiteman. 31 R. I. 88.

Abe Whiteman, a partner in a business conducted under the name of Harry Whiteman, secured goods from the Boston Foundry Company by means of false representations, for which the plaintiff now sues Harry Whiteman.

Held, that a partnership is liable for the fraud of a partner committed in the course of partnership business.

Johnson, J.

By the great weight of authority, it is well settled that all the members of a firm are liable for fraud committed by one of them in the ordinary conduct of the firm's business, although the others do not participate in the fraud and have no knowledge of it. It is well established in the law of agency that a principal is civilly liable for the tortious or fraudulent act, whether criminal or not criminal, of his agent, not only when he has previously authorized or subsequently ratified the act, but even though he may have expressly forbidden it, if it has been committed by the agent in the course and as a part of his employment. Applying these principles of agency, therefore, a firm is liable for any loss or injury caused to any person not a

member of the firm, or for any penalty incurred by any wrongful act or omission of a partner, acting in the ordinary course of the business of the firm, or with the authority of his co-partners. The extent of the firm's liability is the same as that of the partner so acting or omitting to act. Thus, all the members of a firm are liable for defamatory statements made to aid the firm business, for a malicious prosecution instituted for the purpose of furthering such business and by its authority, or for fraud committed by one of them in the ordinary conduct of their business, although the others do not participate in the fraud and have no knowledge of it. The firm is liable for the wrongful acts or omissions of a partner, while he is acting in the ordinary course of the firm's business, or with his co-partners' authority. For torts committed by a partner, or by an agent for whose misconduct a partnership is liable, the injured party may, at his election, sue all the partners or any one or more of them. Supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants, and this rule applies even where the tort in question is committed by an agent or servant of the firm and not otherwise by the firm itself.

15. Right of Firm Creditors to Attach Property of Partner.

Stevens v. Perry. 113 Mass. 380.

Stevens sued Perry & Grimes on a firm debt, and attached personal credits belonging to Perry in the hands of the Bay State National Bank. Later, the credits of Perry in the hands of the same bank were attached by the Swampscott Machine Company in a personal suit against Perry. The question is whether the first or the second attachment will prevail.

Held, that a debt due one partner singly may be attached in a suit against the partnership; and the attachment is not dissolved by a subsequent attachment of the same debt by an individual creditor.

Amcs, J.

In a suit against two or more co-partners upon their joint debt, the separate property of any one of the partners may be attached, and the lien so acquired is not discharged or impaired by a subsequent attachment of the same property, upon a suit in favor of a separate creditor of the same partner. As the debt due from the partners jointly is also due from each, it may be enforced against the separate property of each. It is immaterial whether this separate property is in the form of goods and movable chattels, or goods, effects and credits entrusted and deposited in such manner that they can only be attached upon a trustee process. It is not necessary that the principal debtors should have made a joint deposit, or that the fund

should belong to them jointly. It is enough if funds attachable upon a trustee process are due from the alleged trustee to either one of the principal defendants.

16. Right of Individual Creditor to Attach Firm Property.

Johnson v. Wingfield. 42 S. W. (Tenn. Ch. App.) 203.

Johnson, in a personal suit against Wingfield, attached property of Hazelhurst & Company, a firm in which Wingfield was a partner. The right of an individual creditor of one of the partners to attach firm property is questioned.

Held, that only the interest of a partner in the firm property may be attached in an individual suit against him.

Barton, J.

The confusion and perplexity in which this question is involved is not confined to our own state, but is found in the annunciations of the text writers on this subject, and in the decisions of nearly all of the courts of last resort of the United States and in England. Mr. Freeman, in his work on Executions, in treating of the matter, says: "It is universally conceded that, except where some statutory provision to the contrary has been enacted, the interest of the partner is liable to an execution for his individual debts. Confessedly, a sale under an execution against one partner does not divest the title of the partnership in the property. It transfers only such interest as remains in the judgment debtor upon the settlement and adjustment of the affairs of the partnership. As the rights of the partnership are paramount, it would seem that they would preclude the officer serving the writ from taking the property into his exclusive possession, even for the purposes of levy and sale. And this view has been maintained with great force in several decisions pronounced in the supreme court of New Hampshire. The authorities elsewhere are almost unanimous in affirming that the officer may, in levying on the interest of a partner, assume exclusive possession of the chattels of the firm, and retain it until the sale. It is also undoubted that the interest subject to execution is, at least in equity, in no respect greater than that held by the defendant; that it is subject to the paramount claims against the partnership, and is in fact nothing beyond the right to demand an accounting, and to share in the surplus that may remain after all the partnership obligations have been discharged. Whether the levy can be upon any specific part of the goods of the firm, and whether, by the sale, the purchaser acquires any of the interest in the property sold, beyond the right to call for an accounting, are questions upon which the authorities are not agreed. The earlier cases were determined when partnerships were regarded as mere co-tenancies. Hence, those cases, and such modern cases as have been controlled by them, place sales under execution for the separate

debt of a co-partner very much on the same ground as a sale for a separate debt of a co-tenant. Therefore, according to this view, an officer can, under such an execution, levy upon a part as well as upon the whole of the chattels of the firm; and he can, by his sale, transfer a moiety of the legal title, together with the right to take and hold possession against the other partners, leaving them without any other means of enforcing the rights of the partnership than by proceedings in chancery. But the courts have gradually progressed towards a realization of the true nature of partnerships, and have therefore come to understand that they are materially different from co-tenancies. A co-partner has no right to any specific chattel belonging to the firm, nor has he any right as against the firm to take or hold exclusive possession of any such chattel. The real ownership of all the chattels is invested in the firm. The interest of each partner is merely a right to share in the proceeds of these chattels after all the partnership obligations have been satisfied. Upon what principle can the purchaser at an execution sale be sustained in the exercise of rights to which the defendant was never entitled? Clearly upon no principle whatever. The precedents made at an early day, when the law of partnership was imperfectly understood, are losing their force as authorities. Their place is being supplied by a line of decisions destined to grow in favor and in number, declaring that the creditor of an individual partner cannot sell any specific article, but only the partner's interest in the whole of the partnership assets, and that the purchaser does not acquire the right to hold possession of the property purchased as against the other member of the firm, but only an interest in the proceeds, after the business of the firm shall have been settled. Though the right of the officer to seize the property of the partnership under an execution against one of its members is conceded, it must be exercised, as far as possible, in harmony with the rights of the other partners, and not in hostility to them. His power to take and deliver possession of the *corpus* of the property is merely incidental of the right to reach the interest of the debtor, and is to be exercised only as a means to that end. Consequently, if he exceeds that limit, and undertakes to interfere with the rights of the other partners to a greater extent than is necessary to reach the interest of the debtor partner, and dispose of it, as when, instead of selling the interest of the debtor partner, he undertakes to sell the entire property, though his act is nugatory, such interference renders him liable as a trespasser *ab initio*."

But we do not feel at liberty, in this court, to depart from what we understand to be well settled principles in this state. Nor do we wish to be understood as criticising the holdings of our supreme court upon this subject, further than to call attention to the seeming inconsistencies that arise therefrom, and which are common to all the earlier cases in almost every state in the Union, as well as in England. But, for the purposes of this case, we may state that we understand the decisions in this state to settle the following points:

(1) That partnership property may be levied on by the creditor for the individual debt of a member of the firm. (2) That specific property may be levied on, and it is not necessary that the execution be levied upon all the property of the firm. (3) That the officer may, and that in fact it is his duty to, take actual possession of the property levied on, and to retain it until the sale is made. (4) That the purchaser only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, or a mere right to an accounting. (5) That a levy is necessary in order to fix a lien so as to authorize the filing of a bill.

C. Relations of Partners to Each Other.

I. Duty to Account for Profits.

Latta v. Kilbourn. 150 U. S. 524.

Kilbourn, Latta, and Olmstead were a firm of real estate brokers and auctioneers, doing business under the name of Kilbourn & Latta. Latta entered into a joint speculation in real estate with Stearns, without obtaining the assent of his partners. They now charge Latta with the profit on these sales, although they had all from time to time purchased property for speculation on individual account.

Held, that a partner is not responsible to the firm for profits acquired outside the scope of the firm's business.

Jackson, J.

One partner cannot, directly or indirectly, use partnership assets for his own benefit; he cannot, in conducting the business of a partnership, take any profits clandestinely for himself; he cannot carry on the business of the partnership for his private advantage; he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity without being accountable to his co-partners for any profit that may accrue to him therefrom; he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information, which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

It therefore becomes necessary, in testing the liability of the appellant, to account for the profits realized from the transactions with Stearns, to consider and ascertain what was the scope of the partnership agreement in reference to the purchase and sale of real estate. This is the underlying and essential fact on which rests the

proper determination of the question whether the appellant, in engaging in the joint enterprises with Stearns, violated any duty or obligation which he owed to the firm of Kilbourn & Latta. In other words, the question on this branch of the case depends entirely upon this: Were or were not those transactions within the scope of the firm business, in respect to which Latta owed a duty to his firm, or in respect to which he could properly be said to be the agent of the firm?

It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage. If a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits.

It is not the source of the information, but the use to which it is applied, which is important in such matters. The character of information which the partner might not use for his private advantage is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right.

Tested by these principles, it cannot be properly said that Latta used any information which was partnership property so as to render him chargeable with the profits made therefrom. His knowledge of the real estate market, or in respect to profitable investments therein, was not used in competition with the business of the firm, nor in any manner so as to come within the scope of the firm's business.

2. Right to Choose Partners.

Kingman v. Spurr. 7 Pick. (Mass.) 235.

The Boston and Providence Commercial Stage Company, a partnership, issued share certificates which provided that they were not transferable without the consent of the directors and treasurer. Kingman, to whom a share belonging to Robbins had been transferred without such consent, seeks to compel the associates to account with him as a partner.

Held, that the consent of all the partners is necessary to the admission of a new member to the firm.

Parker, C. J.

We think it very clear that the plaintiff did not become a partner or member of the association, by the assignment to him of Robbins's

interest. It is a settled principle that a co-partnership cannot be compelled to receive a stranger into their league. These associations are founded in personal confidence and *delectus personarum*. It is even held that an executor or heir of one of the members does not become a member, unless by consent or by terms of the compact.

The assignee becomes tenant in common only, and as such may have a right to an account, and to the proportion of profits.

3. Right to Special Compensation.

Emerson v. Durand, Executor. 64 Wis. III.

Emerson and Durand were members of a firm manufacturing linseed oil under the name of Emerson & Company. After dissolution, Emerson contends that he is entitled to compensation for services in addition to his share in the profits.

Held, that ordinarily a partner is not entitled to compensation beyond his share in the profits, but that circumstances may imply an agreement to that effect.

Cole, C. J.

The important question arises whether, upon all the facts which are well established by the evidence, the plaintiff can be allowed any compensation for his services in managing the business. On this point it is not claimed that there was any express agreement that he should be paid for his services, but it is said under the peculiar circumstances the court will imply such an agreement. It is frankly admitted that, as a general rule, one partner cannot charge the other partner for services rendered in the business of co-partnership unless there is an express agreement to that effect, or where such an agreement may be implied from the course of business between the partners, or from the nature of the services performed being such as are not usual for one partner to render without receiving a compensation therefor. The reason given for the rule is that there is an implied obligation in every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern. Each partner, in taking care of the joint property, is, in fact, taking care of his own interest, and is performing his own duties and obligations implied in, and constituting a part of, the consideration for the others to engage in the partnership; and the law never undertakes to measure and settle between the partners the relative value of their various and unequal services bestowed on the joint business.

This is the ordinary statement of the rule of law upon this subject. But still the rule that each partner must be assumed to render his services in the partnership business gratuitously, is not inflexible or of universal application. It has its exceptions, founded in wisdom and experience. Where it can be fairly and justly implied

from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained. So, where a partner fails to perform his agreement to render services to the firm, he may be charged on the settlement of the firm accounts with the value of the services which he agreed to give and refused to render.

This case differs in many important particulars from ordinary partnerships. The question is, Can an agreement to pay the plaintiff what his services were reasonably worth for the management of the business be fairly implied from the circumstances of the case and the acts of the parties? The plaintiff had charge of the business in all its branches and details, gave his entire time and labor to its management, while Mr. Durand, from the nature of his engagements, could not, and in fact did not, give scarcely a day or the least attention to it. He came home usually Saturdays, when he sometimes saw the plaintiff and visited the mill. But the business of the mill was not to interfere with his engagement to the insurance company, and it is very plain it did not. His services and time were faithfully given to the company that employed him. He did not, either as an individual or as trustee, put as much capital into the concern as did the plaintiff. Nor did he, either as trustee or personally, raise as much money for working capital as did the plaintiff on his individual credit.

When these facts, and others of a like tendency, are considered, they afford, to our minds, sufficient ground for implying a contract to compensate the plaintiff for his services in the management of the business. It is unreasonable to suppose the parties intended or understood that the plaintiff would give his entire time, attention, skill, and ability to the promotion of the common enterprise, while Mr. Durand, working for an insurance company on a large salary, should really contribute neither time nor attention nor labor, and that both should stand upon the same ground as to profits, and the plaintiff be paid nothing for his services. But, without dwelling longer upon the evidence bearing upon this point, we conclude by saying that a contract to pay for services rendered may be as fairly and incontrovertibly established by the acts and conduct of the parties, in connection with surrounding circumstances, as by words.

4. Right to Recover Interest on Loans.

Rodgers v. Clement. 162 N. Y. 422.

In a suit for an accounting between the parties, formerly partners, the plaintiff seeks to be credited with interest on a note for money loaned by him to the firm.

Held, that a partner is entitled to interest upon money loaned to the firm.

O'Brien, J.

If the moneys advanced by the plaintiff to the firm were contri-

butions of capital or additions to plaintiff's capital, then he was not entitled to interest on the same, since he must rely upon the profits of the business to compensate him for the investment, unless there was a special agreement between the partners that interest should be allowed.

But, on the other hand, if the moneys so paid or advanced by the plaintiff for the use of the firm were in fact loans, and the plaintiff as to such advances was a creditor of the firm, he stands upon the same footing as any other creditor with respect to the right to be allowed interest upon the accounting. A partner may loan money to the firm of which he is a member, and when he does, his right to interest is to be determined in the same way as that of any other creditor. In such cases the general rule is to allow interest upon the advances, although there was no express agreement by the firm to pay it, in the absence of some agreement to the contrary, express or implied. The right to interest, or an agreement to pay or allow it, is to be implied in such cases without any express promise, as in like transactions between parties holding no partnership relations to each other.

When the money has been paid in as capital, or when there is an express agreement between the parties that interest is not to be allowed or charged, this rule, of course, has no application. So the plaintiff's right to the item of interest must depend upon the fact that the money was a loan to the firm and not a contribution to capital.

The findings of the referee should be construed as importing a loan to the firm and not a contribution to capital.

5. Right of Partner to Contribution for Money Advanced for Firm.

Thomas v. Atherton. L. R. 10 Ch. D. (Eng.) 185.

Thomas, the managing partner of a colliery, received notice from an adjoining owner that work was being carried on beyond the boundary. He insisted that he was entitled to the disputed ground, and continued the work. For this act, he was sued for trespass by the adjoining owner, who recovered damages against him. He brings this bill to compel his partners to contribute to the amount so paid by him.

Held, that while a partner is ordinarily entitled to contribution for money advanced for the firm, he is not so entitled if the expenditure has been necessitated by his own fault.

James, L. J.

Prima facie, damages given against one partner for a partnership act are to be paid like any other partnership debt, but with this exception, that if the damages were occasioned by the personal misconduct or culpable negligence of one partner, he alone must bear

the consequences. In this case the defendants do charge the plaintiff with such misconduct or negligence. To dispose of this charge it is necessary to go into the circumstances under which the trespasses or acts found to be trespasses were committed.

The plaintiff was the managing and resident partner, and it is charged against him that such trespass could not have occurred without very serious and culpable neglect on his part. Certain it is that it is one of the most important duties of the manager of a colliery, not merely a duty to his neighbors but to his principals, to keep carefully within his boundary. The consequences of not doing this are most serious.

It was a speculation which no partner had a right to involve his co-partners in without their full knowledge and concurrence.

6. Right to Accounting.

Lord v. Hull. 178 N. Y. 9.

Two partners bring this action against the third for an accounting without a dissolution. The defense is that only one point of difference, a matter of internal regulation, was in dispute, so that an accounting was unnecessary.

Held, that an accounting between partners will not ordinarily be granted prior to dissolution.

Vann, J.

The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, or except with a view to dissolve the partnership and by a final decree to adjust all its affairs. It is not its office "to enter into a consideration of mere partnership squabbles," or "on every occasion to take the management of every play-house and brew-house." If the members of a firm cannot agree as to the method of conducting their business, the courts will not attempt to conduct it for them. Aside from the inconvenience of constant interference, as litigation is apt to breed hard feelings, easy appeals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by co-partners should not be encouraged, and they should realize that, as a rule, they must settle their own differences or go out of business. "A partner, who is driven to a court of equity as the only means by which he can get an accounting from his co-partners, may be supposed to be in a position which will be benefited by a dissolution; in other words, such a partnership as that ought to be dissolved."

While a forced accounting without a dissolution is not impossible, it is by no means a matter of course, for facts must be alleged and

proved showing that it is essential to the continuance of the business, or that some special and unusual reason exists to make it necessary. Three classes of cases are mentioned as exceptions to the general rule:

"1. Where one partner has sought to withhold from his co-partner the profits arising from some secret transaction;

"2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner or drive him to a dissolution;

"3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action and a limited account will result in justice to them all."

The plaintiffs claim that this case belongs to the second class, and the courts below have so held, but, as we think, it does not come under any head of the [foregoing] classification, which is correct as far as it goes, and it goes as far in the direction of the plaintiff's theory as any just classification that can be made.

7. Suits at Law Between Partners.

King v. Moore. 72 Ark. 469.

Moore brings an action at law against C. A. & M. G. King, a firm of which he was a member, for the services of himself and of his minor son, who was employed by the firm.

Held, that a partner cannot maintain a suit at law against the other partners upon matters arising out of partnership transactions.

Riddick, J.

There is only one question in this case: Can a member of a partnership, who has a minor son in the employ of the firm of which he is a member, bring an action at law and recover the value of the services performed by his son against his co-partners? The amount due the partner by the firm for the services of his minor son is a partnership debt, and while the business of the firm is still unsettled, it cannot be told what portion of this debt is due from any one partner. Until the partnership accounts have been settled, it is not a debt of either of the partners, but of the firm. The only action that can be maintained between partners upon a partnership transaction before a settlement of the partnership affairs is a suit for an accounting.

We see no distinction between this debt of the firm to the plaintiff for the services of his son and the debt of the firm to him for his own services, so far as the right to sue the firm is concerned. They are both debts which the firm owes him, and for which he can get credit in an action for an accounting between the partners.

8. Suits at Law Upon Separate Transactions.

Wilson v. Wilson. 26 Ore. 251.

The plaintiff sues the defendants at law upon a note made by them to him for advances to the firm of which they were all members. The defense is that the note represents a firm transaction, and for that reason is not enforceable except in a suit in the nature of an accounting.

Held, that a partner may maintain an action at law against the other partners upon a transaction separate from firm affairs.

Wolverton, J.

It is true, as a general rule, that until the accounts of the partners are finally adjusted, or until the affairs of the firm are so far settled as that nothing remains to be done by it or its members except to ascertain the final state of the account between the partners, no action can be maintained by one partner against the other in respect of particular items of account pertaining to the partnership business. But there are exceptions to this general rule, and a prominent one is where the sum sought to be recovered is separated from the partnership account. So a partner may sue his associate at law upon a note or due bill given him on a partial settlement of the partnership affairs. The giving of a promissory note by one partner to another is an isolation of the demand in respect of which the note was given from the general partnership account. So it would appear that an action at law is maintainable by one partner against another upon a promissory note executed by the one to the other involving particular items or transactions of the partnership business, upon the ground that the giving of the note is an isolation or separation of the particular matter from the general partnership account, and that an accounting and final settlement of the partnership affairs is not necessarily involved in such action; that the execution of the note is such an acknowledgment of isolation or elimination of the particular transaction from the general partnership account as that the maker will be estopped at law from questioning the holder's right of action thereon.

III.

TERMINATION OF PARTNERSHIP.

The partnership relation may be terminated:

1. By act of the parties. Although the contract of partnership contemplates dissolution at a given time, it may be terminated at the will of any partner, for the law will

not force parties to remain in this confidential relationship if any of them is unwilling to do so. In this respect, the law of partnership is like that of agency; the association is terminable even though an action for breach of contract arises out of the termination. A partnership is also ended by act of the parties, if the parties agree to dissolve, if the purposes for which the firm was organized are fulfilled, or by the expiration of the time of duration contemplated by the agreement. If the firm continues to do business after the expiration of a specified time, the relationship is that of a partnership at will operating under those terms of the original contract which are applicable.

2. By operation of law. The death of a partner operates as a dissolution of the firm. His heirs or representatives are entitled to his property rights in the firm, but are not entitled to become members of it. The sale of a partner's interest, his bankruptcy, and war between the countries of the partners also terminate the partnership by operation of law.
3. By judicial decree. Dissolution may be decreed on account of fraud by one partner or on account of his misconduct. The misconduct must be injurious to the partnership business and must amount to a wilful violation of the partnership agreement or threaten the solvency of the firm. An occasional error of judgment by a partner is without effect as long as he acts in good faith. Continued physical or legal incapacity is also a ground for seeking dissolution.

In the case of involuntary dissolution by judicial decree, death, insolvency or bankruptcy, or war, no notice of dissolution is necessary in order to relieve members of the firm from liability for subsequent acts done by their former partners. In the event of voluntary dissolution, however, a partner must give actual notice of dissolution to former creditors of the firm if he would avoid liability by estoppel. To other persons, general notice, such as publication in the newspapers, is sufficient to relieve outgoing partners. Unless the required notice is given, actual dissolution of the firm does not relieve former members from liability. Persons who have already dealt with the firm are entitled to assume that the partnership relation continues until they have knowledge to the contrary, and unless proper steps are taken, may hold former members without regard to their actual participation in the business.

Upon dissolution, the first consideration in the settlement of

firm affairs is the payment of partnership debts. If this cannot be done readily, the rights of creditors become of importance. Firm assets are in the nature of a fund to which firm creditors are entitled to resort. In order to enable them to do this, the so-called rule of marshalling is applied. By this rule, firm creditors are entitled to firm assets in satisfaction of their claims, while individual creditors are entitled to the individual assets of the partners. If anything remains of firm assets after firm creditors are satisfied, the share of each partner may be applied in satisfaction of his individual debts; and if anything remains after satisfaction of individual creditors, the individual property of a partner may be applied to the payment of firm debts. But until firm creditors are satisfied, no firm assets may be applied to individual liabilities, and until individual creditors are satisfied, no individual assets may be applied to firm liabilities. This rule is applied in most jurisdictions even if there are no firm assets and no solvent partners, but in that event a few jurisdictions follow the English equity rule of sharing *pari passu*. By this rule, all the creditors, both firm and individual, share equally in the total assets.

At, or immediately before, dissolution, one partner may convey all his interest in the firm to a co-partner, so as to constitute the assets the private property of the transferee partner, and thereby defeat the priority of firm creditors. In some states such a transaction is not valid if the firm is at the time insolvent, while in others it is good if made in good faith. In any event, it is only when the partners act fairly for the purpose of winding up that creditors will be bound. In such cases, of course, the right of firm creditors to hold the transferring partner is not changed. He is still personally liable as before.

When the partners are solvent, and one partner transfers his interest to another under a contract that the transferee shall pay firm debts, the agreement may constitute merely a personal contract, or it may result in the creation of a trust fund for creditors. If it is merely a personal contract with the outgoing partner, and does not create a trust, firm creditors derive no benefit therefrom.

If no transfers have been made before dissolution, the firm property belongs to the partners as co-owners, and after creditors are satisfied, both real and personal property are distributed in accordance with that conception. If the dissolution is caused by death, firm real estate descends to the heirs of the deceased partner, subject to the right of the surviving partner to have the property applied to the payment of the firm debts and to the satisfaction of equities between himself and the deceased partner. After these rights are satisfied, the real estate belongs to the heirs and becomes subject to the widow's right of dower. Firm personal

property upon dissolution by death belongs to the surviving partner, who takes it subject to the right of the personal representatives, not the heirs, of the deceased partner to have it sold for the payment of firm debts, or in order to realize the share of the deceased partner in the firm. For this reason, when a surviving partner sues to collect a firm debt, the firm debtor may set off a personal credit against the surviving partner.

Upon dissolution, the following distribution of assets is usually made:

1. Firm creditors are paid.
2. Each partner is repaid his advances.
3. Each partner is repaid the capital invested by him.
4. The balance is distributed as profits.

After creditors are paid and advances by members to the firm are repaid, the investment of each partner is returned to him unless there is an agreement to some other effect. In event that there is not enough left to return the capital, unless it is otherwise agreed, losses of capital belonging to the firm fall upon the members in the ratio in which they share profits, and this is true whether they have contributed equally, unequally, or nothing at all. In the absence of agreement, profits are shared equally. Any loss of capital used by the firm, which does not belong to the firm but remains the individual property of one partner, must be borne by the partner who contributed it. If one partner has contributed more than his share to the making up of losses, he is entitled to contribution from the others to such extent that he shall bear only his proportionate share.

A. Termination of Partnership.

1. By Act of the Parties.

Karrick v. Hannaman. 168 U. S. 328.

Hannaman seeks to dissolve a partnership with Karrick in a mercantile and laundry business which was to continue for five years. The suit is brought before the expiration of the five years, and the question arises whether a partner who has agreed to continue partnership for a term of years may dissolve it at will.

Held, that although the time of duration of a partnership is specified, it may be dissolved by either partner without the assent of the other before the expiration of that time.

Gray, J.

It is universally conceded that a contract of partnership, containing no stipulation as to the time during which it shall continue in

force, does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, but may be dissolved by either partner at his own will at any time.

A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interest in the profits. It is in effect a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner. Every partnership creates a personal relation between the partners, rests upon their mutual consent, and exists between them only. Without their agreement or approval, no third person can become a member of the partnership, either by act of a single partner, or by operation of law; and the death or bankruptcy of a partner dissolves the partnership, although it does not make the assignee a tenant in common with the other partners in the partnership property. No partnership can efficiently or beneficially carry on its business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation and to the authority of each partner to act for all; but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract. According to the authorities, the only difference, so far as concerns the right of dissolution by one partner, between a partnership for an indefinite period and one for a specified term is this: In the former case, the dissolution is no breach of the partnership agreement, and affords the other partner no ground of complaint. In the latter case, such a dissolution before the expiration of the time stipulated is a breach of the agreement, and as such to be compensated in damages. But in either case the action of one partner does actually dissolve the partnership.

A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable in an action at law against him by his co-partner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property, is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances.

2. By Completion of Purposes.

Seufert v. Gille. 230 Mo. 453.

Gille and Van Peyma were partners in the hardware business under the firm name of Gille & Van Peyma. They later formed a corporation which took over all the assets of the partnership. Later still, Van Peyma gave a note signed in the firm name to

Seufert, who now seeks to hold Gille, without whose knowledge or consent the note had been given. The defense rests upon the ground that the firm had been dissolved, thereby terminating the authority of Van Peyma.

Held, that a partnership is terminated by the transfer of its entire assets.

The Court:

"It has been questioned whether the incorporation of the partners, for a similar business, would amount to a dissolution by consent. This has not infrequently occurred in this country, where successful manufacturers or mechanics have found their business so enlarged that it was more convenient to transact it under the form of a corporation. We should say that this fact alone would not necessarily be the dissolution of the partnership. But it never would stand alone. The corporation would always have some defined relation to the former partnership. Either it would be a substitute, taking all its business and all its property, leaving it nothing to hold, nothing to do, and nothing to be; in which case it would be clear that the partnership had died out; or else some portion of the business and the stock would be left for the firm, and some use made of it; and then it would remain for these purposes."

We think the partnership was in law dissolved when it transferred its entire stock of goods to the corporation. Thereafter, the corporation became "a substitute" for the partnership, "taking all its business and all its property, leaving it nothing to hold, nothing to do, and nothing to be. In which case, it would be clear that it had died out." Such action on the part of a partnership is very similar in its legal effects to the retirement of one member of the firm, which *ipso facto* operates as a dissolution of the firm. Or such action may be likened to a partnership which, by the terms of association, is to continue for a definite term of years, in which case, "when that period expires, or the time for dissolution arrives, the partnership dies, of course." This partnership was a mercantile one, organized for the purposes of trade. It had no other business except to buy and sell goods. When it transferred all its goods to the corporation and ceased to either buy or sell goods and to have any place of business, the purposes of its existence had been fulfilled and it was thereby dissolved as a trading partnership, and both the partners so understood it; and "the mere fact that a firm has incurred debts and charged its assets for their payment is no proof of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before a dissolution." And generally one partner cannot execute a note in the name of the firm after its dissolution, even in renewal of a note of the firm, so as to bind any other partner or the firm. No member of a co-partnership after its dissolution can by any act or admission of his bind the firm of which he was a member, except it be otherwise agreed by the articles of association or of dissolution.

3. By Death.

Martlett v. Jackman. 3 *Allen (Mass.)* 287.

Jackman, Hathaway, Chick, and Leach were partners engaged in constructing railroads under the firm name of Hathaway & Company. After the death of Chick, Leach signed the firm name to a note which he gave to the plaintiff. The other partners contend that the partnership was dissolved by the death of Chick, and that they were not bound to give notice of dissolution to the plaintiff.

Held, that death dissolves a partnership; and that no notice of dissolution is required to relieve the other partners from liabilities subsequently created by one partner.

Bigelow, C. J.

One of the essential elements of a contract of co-partnership consists in the right which each member has to the continuance of all his associates as members of the firm. If one withdraws, the co-partnership is at an end. The *delectus personarum* is at the foundation of the agreement of the parties, and is one of the main considerations on which it rests. The personal qualities of each member of the firm enter largely into the inducements which lead parties to form a co-partnership; and if the abilities and skill, or the character and credit, of any one are withdrawn, the contract between them is terminated and the co-partnership is dissolved. It would seem to follow that the power of the surviving partners to bind each other by new contracts and engagements must at once cease. The co-partnership would then be terminated not only as to the deceased partner and his estate, but also as to the other members of the firm. The *delectus personarum* would no longer exist. The co-partnership constituted the principal; and the several co-partners were agents, not of the different persons composing the firm, but only of all taken together and forming one body united in a community of interests for common objects.

The reason of the rule which requires in cases of the dissolution of a firm caused by the voluntary act of the parties, or by circumstances which would necessarily come within the knowledge of the co-partners but might be unknown to third persons, that notice of it should be given in order to relieve the members from future responsibility, does not apply where the co-partnership is terminated by death. The opinion has certainly prevailed very generally that no notice is necessary; that the partnership, according to the common course of the law, is dissolved by death; that those who deal with the company are held to know the state of their debtor; and that the publication of all deaths, according to the common custom of the world, places this sort of information within the reach of ordinary care and diligence. Death operates a dissolution of itself; and, being

a public fact, all men are bound to know it. In this respect, the consequences of a dissolution by death are the same as one occasioned by war between two countries of which co-partners are respectively citizens. No notice is required to be given when a fact is of a public nature. Nor can it make any difference as to this liability of the survivors, that they knew of the death of their co-partner and omitted to give notice of it to the person with whom the new contract was made. As the fact of death was not in its nature private or confined within the knowledge of the members of the firm, the presumption is that third persons also had notice of it. Therefore the liability of survivors upon a new contract, not entered into by themselves, but by one of their associates without their knowledge or assent in the name of the firm, cannot be made to depend on the question whether they had previous notice of the death. They ought not to be held liable for omitting to give notice of that which others are supposed to know. And although the member of the firm who actually enters into a contract may be responsible, as upon a contract made by himself individually, or on the ground that by making it in the name of the firm after its dissolution, he by implication represented a fact to be true which he knew to be false, or which he did not know to be true, and thereby caused loss or injury to an innocent third party, there is no good reason for holding the other co-partners liable, who have remained passive and done no act by which third parties have been deceived or misled, or induced to change their position or to part with their property.

4. By War.

Stevenson & Sons, Ltd. v. Aktien-Gesellschaft für Cartonagen-Industrie. (1916) 1 K. B. (Eng.) 763.

At the outbreak of the World War, the parties, respectively subjects of Great Britain and Germany, were partners in the manufacture of mill edgings for boxes, for which the plaintiffs were sole agents in Great Britain. The plaintiffs seek to determine the effect of the war upon the partnership.

Held, that a partnership is dissolved by war between the countries of the partners.

Atkin, J.

The legal effect of an outbreak of war upon a partnership between two persons, each residing in the respective belligerent countries, is to dissolve the partnership. The relationship necessarily involves commercial intercourse in the closest degree, and such intercourse on the outbreak of war becomes illegal. Once such illegality has supervened, it seems impossible for the relationship to continue to exist so as to be capable of being revived after the war. Indeed the question seems to be concluded by s. 34 of the Partnership Act, 1890,

which provides that "a partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership."

Is it conceivable that the law which requires a partnership to be dissolved on the outbreak of war on the ground that the continuance of the relationship is inconsistent with national interests yet permits the enemy to retain an interest in the successful issue of British commerce, with the result that in case of a business benefited by war, his profits may increase in proportion to the length or severity of the war?

The enemy's interest in the partnership at the date of dissolution is that to which he is entitled. Such right is in normal times to have the debts of the partnership paid out of the partnership assets, and the surplus, if any, distributed amongst the partners. It seems impossible that he can insist on the business being terminated to secure this result, and full effect can be given to his right of property by holding that where his British partner desires to carry on the business, the enemy's right is to have his interest valued as of the date of the declaration of the war, and to be paid, where payment is legally possible, that amount.

5. By Incapacity of Partner.

Barclay v. Barrie, 209 N. Y. 40.

Barclay brings suit to procure dissolution of a partnership between himself and Barrie in a manufacturing business, on the ground that Barrie had become incapacitated by reason of paralysis from performing his duties as a partner.

Held, that upon permanent incapacity of one partner, the partnership may be dissolved.

Hiscock, J.

Independent of express provision, a partner impliedly undertakes to advance the success of the co-partnership by devoting to it, within reasonable limits, his time, efforts and ability. His co-partners are entitled to his contribution, and if for any reason he fails to fulfill his duties, they are thereby deprived, in greater or less degree according to the extent of his failure, of the benefits of the contract which they have made and of the fruits thereof to which they are legitimately entitled. With entire justice, therefore, the principle has been well established that courts of equity have power to decree dissolution of a co-partnership because of permanent incapacity of a partner which materially affects his ability to discharge the duties imposed by his partnership relation and contract.

"Permanent" incapacity as a ground for dissolution means incapacity which is lasting rather than merely temporary, and the prospect of recovery from which is remote; which has continued or

is reasonably certain to continue during so substantial a portion of the partnership period as to defeat or materially affect and obstruct the purpose of the partnership.

6. By Misconduct of Partner.

Rosenstein v. Burns. 41 Fed. 841.

The parties were partners under a written agreement of partnership for the canning of fish, which was to last for five years. Before the expiration of that time, a bill is brought by one of the partners for a decree of dissolution, on the ground that the defendants had failed to comply with the terms of the agreement, that the business was conducted at a great loss, and that the plaintiffs were induced to enter the partnership by false representations on the part of the defendants.

Held, that a partnership may be dissolved on account of misconduct of one of the partners.

Nelson, J.

A partner is under no obligation to continue a member of a partnership when his co-partner persistently and wilfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm, and resorting to his action at law upon the partnership contract for redress. He is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his co-partner or from a failure of the business itself. So, if he has been induced to enter into the partnership contract through the deceit of his co-partner, he may withdraw whenever the fraud practised upon him becomes known. In neither case is he required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership.

7. Causes of Dissolution Under Uniform Partnership Act.

Laws of New York. 1919. Chapter 408. Article 6.

Section 62. Causes of dissolution. Dissolution is caused:

1. Without violation of the agreement between the partners,
 - (a) By the termination of the definite term of particular undertaking specified in the agreement,
 - (b) By the express will of any partner when no definite term or particular undertaking is specified,
 - (c) By the express will of all the partners who have

not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

- (d) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners;
- 2. In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;
- 3. By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;
- 4. By the death of any partner;
- 5. By the bankruptcy of any partner of the partnership;
- 6. By decree of court.

8. Effect on Contracts With Firm.

Hughes v. Gross. 166. Mass. 61.

Hughes had a contract to work for the firm of Gross & Strauss for one year. Hughes also had the right to renew the contract for another year. Strauss died during the first year and the business was carried on by Gross. The question is whether the death of Strauss ended the contract.

Held, that a contract made by a firm is a joint contract which is not necessarily terminated by the death of one of the partners.

Holmes, J.

It could not be ruled, as matter of law, that the contract of service was dissolved by the death of a partner. We have no occasion to criticise the decisions in some of our states and in England and Scotland, where an opposite result was reached by a majority of the judges with reference to different kinds of business from the present, except to remark that the argument put forward in Scotland and elsewhere that the only contracting party was the firm, and that the firm had ceased to exist, does not agree with the common law. The common law does not know the firm as an entity. A contract with a firm is a contract with the members who compose it. A joint contract to employ the plaintiff is not ended necessarily by the death of one of the contractors. And there is no universal necessity that death should have a greater effect when the joint contractors are partners. If the death naturally would put an end to the business, as it so frequently does, very possibly it might end the employment. We have no need to consider what would be the result if in fact no further business was done except to wind up

the affairs of the firm. But this business went on without a break, and both parties seem to have assumed that the plaintiff's contract was not ended by the death of Strauss.

9. Effect of Expiration of Agreed Term of Partnership.

Cox v. Willoughby. L. R. 13 Ch. D. (Eng.) 863.

Lord and Cox, attorneys at law, entered into a partnership agreement which provided among other things, by article 19, that in case Cox died, certain payments should be made to his estate. The duration of the partnership was to be fifteen years, but provision was made for the entry of Willoughby into the firm in the meanwhile. Willoughby entered the firm, which continued beyond the specified term without a new agreement. After Lord and Cox died, Willoughby carried on the business. He now contends that as the term of the partnership expired prior to the death of Cox, he is not bound by the agreement relative to payments to the estate of Cox.

Held, that if the partners continue to transact the business of the firm after the expiration of a partnership agreement, those provisions of the original contract which are not inconsistent with a partnership at will, continue in force.

Fry, J.

The question is whether clause 19 of the articles applies to the partnership at will which was constituted by mutual consent after the expiration of the term of fifteen years. "If a partnership, originally entered into for a definite time, is continued after the expiration of that time, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se*." The rule is also stated thus: "We know that after the expiration of the term at first agreed upon, partnerships frequently continue without a new agreement; and the effect of that is, that the partners, after the expiration of the partnership term, continuing to carry on the trade without a new deed, all the old covenants are infused into the new series of transactions; with the single exception of the covenant for duration, for either may *instantly* dissolve the prolonged partnership; but all the other original stipulations are continued." In my view that is not so accurate a statement of the rule as is that [first given]. The exception, I think, does not apply only to the covenant for duration, but to every stipulation in the original deed which is consistent with the new partnership at will. Obviously there may be many provisions not consistent with such a partnership, and all those, and those only, which are consistent will apply. Is this 19th clause consistent or inconsistent with a partnership at will? In my judgment it is quite consistent, and I therefore hold that the partners continued bound by it.

B. Rights of Creditors.

I. In General.

Thayer v. Humphrey. 91 Wis. 276.

Suit is brought to determine the respective rights of numerous creditors of Putnam & Company, and of Goss & Company, which had taken over the assets and liabilities of Putnam & Company, and had subsequently become insolvent.

Held, that ordinarily the joint assets of a firm are to be applied to the demands of joint creditors, and the individual assets of the partners, to the demands of individual creditors.

Marshall, J.

In order, now, that the principles of equity jurisprudence here applied may definitely appear, we recapitulate as follows:

1. In the administration of the affairs of a partnership and of the individual members thereof, the fixed rule must be applied that joint estate goes first to joint creditors, and separate estate to separate creditors, with the exception that where there are no partnership assets, and there is no living solvent partner, partnership creditors may prove with the separate creditors of a partner in the settlement of his estate *pari passu*.

2. Partnership creditors have no lien, strictly so called, on partnership assets, but must work out their preference over the creditors of the individual members of the partnership through the equities of such members.

3. If one of a partnership sells out, *bona fide*, his interest to his co-partner or to another, without in any way retaining his equity to have the partnership creditors paid out of the assets, the property is converted into the individual property of the purchaser, free from all the equities of the seller, even if the purchaser, as the consideration for such purchase, agrees to pay the firm debts; otherwise, if the purchaser agrees expressly or impliedly to apply the assets to such purpose.

4. The word "assets" used in No. 1, is not confined to assets at law, but includes all assets applicable to the payment of the partnership debts, under the well defined principles for the administration of the affairs of insolvent partnerships under the direction of a court of equity.

5. Those who deal with persons representing themselves to creditors generally as partners in a certain business are entitled to have the property used in such business applied to the payment of the debts incurred in such business in preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied.

6. If a member of an insolvent firm sells out with the understanding that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts and to wind up the old partnership concern by the payment of the debts of such concern out of the partnership assets and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues.

7. If one of the members of an insolvent firm sells out his interest to an outside party or to his associates, and thereby a new firm is formed, which assumes the debts of the old firm, the intention of all parties being that the new firm shall continue the business in substantially the same way with substantially the same assets and that the old debts shall be paid out of such business, and such new firm subsequently makes an assignment for the benefit of creditors, in the administration of the assignment the creditors of the old and the new firm may prove their claims *pari passu*, and be preferred over individual creditors of the members of such new firm.

2. The Rule of Marshalling.

Davis v. Howell. 33 N. J. E. 72.

Bennett & Andrews, partners, made an assignment for the benefit of creditors to Davis. Five days later, Andrews made a personal assignment to Davis and Howell. Certain of the partnership creditors seek to share in Andrews' personal estate. This suit is brought by the assignees to determine the rights of these creditors.

Held, that upon insolvency of a firm, the rule of marshalling is applied.

Runyon, C.

The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate. And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet is it so firmly established that it must be regarded as a fixed rule of equity. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this state. In

Scull v. Alter [1 Harr. 147], the supreme court recognized the rule in all its parts. Chief Justice Hornblower, by whom the opinion of the court was delivered (the question arose under an assignment under the assignment act, and was the same as is presented in this case), said: "But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their respective and several estates, then it must be treated as such. The estates and debts must be marshalled; the partnership effects applied in the first instance to the partnership debts; the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

The objection that is always pressed as the conclusive argument against it is, that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim as to the balance of his debt, which the partnership assets may not be sufficient to satisfy, with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate he will not be deprived of it. But if he has no such lien, and the assets are to be marshalled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will, in like manner and for like reason, give the latter preference upon the separate property.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets which may remain after payment of the separate debts.

3. Rule of Marshalling.

Murrill v. Neill. 8 How. (U. S.) 414.

Tiernan was a partner in the firm of Tiernan, Cuddy & Co., which became bankrupt. This suit is brought by firm creditors to reach property belonging to Tiernan, in the hands of Neill, to whom Tiernan conveyed assets out of his personal estate for the settlement of private debts. The question at issue turns upon the right of firm creditors to share in the personal estate of a member of a bankrupt firm.

Held, that the rule of marshalling applies in bankruptcy without exception.

Daniel, J.

The rule in equity governing the administration of insolvent partnerships is one of familiar acceptance and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this:— That partnership creditors shall in the first instance be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety.

It may be proper in this place to mention the two departures permitted by the Court of Chancery in England from the general rule pursued by that court. The first is presented in the instance in which the petitioning creditor, though a joint creditor, is permitted to charge the separate effects *pari passu* with the separate creditors, because, as it is said, his petition, being prior in time, is in the nature of an execution in behalf of himself and the separate creditors. The second is that in which there are no joint effects at all. In this last instance it is said that the joint creditors may come in for dividends *pari passu* on the separate effects; though if there be joint effects, though of the smallest possible amount, this privilege would not be allowed. These exceptions it seems difficult to reconcile with the reason or equity on which the general rule is founded; they are but exceptions, however, and cannot impair that rule.

4. Administration of Estate of Members of Insolvent Firm.

Francis v. McNeal. 228 U. S. 695.

Francis was a member of a firm trading as The Provident Investment Bureau, which was petitioned into bankruptcy. The bankruptcy court ordered that the separate assets of Francis be turned over to McNeal, the trustee in bankruptcy of the firm. The validity of this order is questioned.

Held, that upon bankruptcy of a firm, the assets of the individual partners may be administered by the bankruptcy court.

Holmes, J.

The notion that the firm is an entity distinct from its members

has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the Bankruptcy Act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

In that case naturally the partnership property may be administered by the partners not adjudged bankrupt and does not come into bankruptcy at all except by consent.

If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy.

5. Right to Proceed Against Estate of Deceased Partner.

Doggett, Ex'x. v. Dill. 108 Ill. 560.

Dill was a creditor of Doggett, Barrett & Hills, a partnership. Upon the death of Doggett, he seeks to prove his claim against Doggett's estate without previously attempting to collect from the firm.

Held, that a firm's creditors may proceed against the estate of a deceased partner for collection of the firm debts without previous recourse to firm property.

Craig, J.

"The doctrine formerly held upon this subject seems to have been, that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners were at the time, or subsequently became, insolvent or bankrupt. But that doctrine has been since overturned, and it is now held, that in equity all partnership debts are to be deemed joint and several, and consequently the joint creditors have, in all cases, the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of a deceased partner, whether the survivors be insolvent or bankrupt, or not."

We are satisfied that the rule holding the estate of a deceased partner primarily liable in equity, is sound in principle. Doggett, in his lifetime, was individually liable for this debt, and if he had been sued, and a judgment obtained against him, any of his individ-

ual property would have been liable to be taken and sold in satisfaction of the debt. It is true, if he had been sued at law in his lifetime, it would have been necessary to join his partners as defendants in the action; but after judgment, it was not necessary to exhaust the partnership assets before individual property could be taken, but the creditor could resort to such property in the first instance, if he saw proper. Did the death of Doggett in any manner change the liability which existed on this contract before his death? The liability continued as before, but the remedy to enforce that liability was changed from a court of law to a court exercising equitable powers.

6. Transfer by Firm to Secure Individual Creditors.

Jackson Bank v. Durfey. 72 Miss. 971.

The bank, a firm creditor of Durfey & Ascher, seeks to annul deeds of trust whereby, at a time when the firm and its members were hopelessly insolvent, firm assets were mortgaged to secure individual debts of the partners.

Held, that members of an insolvent partnership cannot lawfully convert a joint asset into a several asset to the detriment of the firm creditors.

Cooper, C. J.

The conflict of decision arises with the question whether the partners may, by convention, waive their rights and convert the joint estate into severalty, thus subjecting it to the debts of the individual members, or, by direct appropriation, apply the joint estate to such debts. It is quite generally held that this may be done, so long as the partnership is a solvent and going concern. Some courts seem to hold that, if the partnership, though insolvent, is yet engaged in the prosecution of its business, it may thus deal with the partnership estate, and others that this may be done even though the partnership is insolvent, contemplates dissolution and converts the joint into separate estates for the purpose of applying it to the individual debts of its members.

But the decided weight of authority is that, while the right of firm creditors to go against the firm property in postponement of the right of the creditors of the individual members is a derivative right, and rests on the right of the members of the firm, and while that right is lost by the bona fide waiver of their rights by the partners, it is not lawful for the members of the firm, in contemplation of insolvency, to divert the firm property and apply it to the payment of the debts of the individual members, or to convert the joint estate into estates in severalty, to prevent its being subjected by firm creditors. In equity a partnership is, for some purposes, deemed a single entity. Thus, where partnership property invested in the business of a partnership is to be applied by a court of equity to the pay-

ment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, and is used, first, to liquidate the debts contracted in the business of that debtor, and only the surplus, if any, is surrendered to the individual partners.

"Partnership creditors in equity have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts."

7. Effect of Transfer by Partner to Individual Creditor.

Menagh v. Whitwell. 52 N. Y. 146.

Suit is brought by Menagh against Whitwell for the conversion of property formerly belonging to the firm of Smith & Company. The firm was indebted to the Geneva National Bank, which recovered judgment and which caused the property in suit to be seized by Whitwell, a sheriff. Menagh claims the title to an undivided part through a chattel mortgage given by Smith on his share of the firm assets as security for a personal indebtedness to the plaintiff. The question is whether a transfer of firm property by a partner to pay an individual debt, when the firm is insolvent, is good against partnership creditors, as was held in the lower court.

Held, that a transfer by one partner is good against creditors only if the firm is solvent and sufficient remains to pay partnership debts.

Rapallo, J.

[The] position [of the lower court] is not without authority in its support. It is founded upon the theory that the separate transfers of the individual interests of all the partners divested the title of the firm; that firm creditors have no lien upon the partnership effects and no direct right to compel their application to firm debts in preference to individual debts. That the right to compel this application is an equity vested in the partners themselves, and exists only as between each other. That so long as equity exists in any of the partners, the creditors have an equity to compel its enforcement between the partners, and may, by this means, obtain the application of the partnership properties to their demands, in preference to the individual debts or separate dispositions of any of the partners; in other words, "that the equities of the creditors can only be worked out through the equities of the partners." From these premises, the conclusions have been drawn that if such equities are waived or released by the partners themselves, the creditors lose them and that

a transfer of the individual interest of a partner in the firm property to a third person extinguishes the equity of the partner, and consequently that of the creditors, which is dependent upon it. This doctrine has been carried to the extent of holding that if the individual interests of each of the members of a firm are successively sold under executions against such members respectively for their individual debts, the purchasers acquire the *corpus* of the property, free from the co-partnership debts, and the equities of the partners and partnership creditors are extinguished.

The injustice and it may be said, the absurdities, which result from such a view lead to an inquiry into its correctness.

The *corpus* of the effects is joint property, and neither partner separately has anything in that *corpus*; but the interest of each is only his share of what remains after the partnership debts are paid and accounts are taken.

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts.

Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold, and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm.

No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken.

No person deriving under a partner can be in a better condition than the partner himself.

A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner of his undivided interest cannot avail against the creditors of the partnership who attach the partnership property.

There is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partnership debts in preference to the separate debts of one partner; that is where a bona fide sale has been made by a retiring partner, in a solvent firm of two members, to his co-partner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the *corpus* of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united

in a sale to a stranger. It remained subject to execution for firm debts so long as it continued in the hands of the purchasing partner. It is conceded that the creditors have no lien which would affect the title of a purchaser from the firm. But the question now is, what is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third persons?

Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individual shares by the several partners can convey a good title to the whole property free from the joint debts, would be to return to the doctrine, long since exploded, that partners hold by moieties as tenants in common. In the present advanced stage of the law upon this subject, no established rule is violated by holding that the title of the firm, as between it and its creditors, cannot be divested by the acts of the partners severally, not in the business of the firm, nor by the separate creditors of members of the firm (further than such temporary interruption of the possession as may be necessary to enable the officers of the law to make an effectual sale of the interest of the debtor partner). This view does not recognize any lien of partnership creditors upon the firm property. The firm have power to dispose of it without regard to the creditors, provided the disposition be not fraudulent. But the individual members or their creditors ought not to have any such power, and all transfers made by them for individual purposes should be held inoperative upon the *corpus* of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners separately, than when made by a portion of them, but the property should be deemed to continue in the firm until its title has been divested by some act of the firm.

Allen, J.

From the facts found, and stated as favorably for the plaintiff as the evidence would permit, the firm was insolvent, and hopelessly so, except as struggling men will hope against hope, and the transfer of the partnership property for the payment of individual debts was, therefore, a fraud upon the creditors of the firm, and void.

8. Effect of Transfer by Partner to Partner.

Stanton v. Westover. 101 N. Y. 265.

W. G. Westover, a partner of the firm of O. M. & W. G. Westover, sold his interest in the partnership in good faith to

O. M. Westover, and retired from the business. The firm was then solvent but O. M. Westover was insolvent, though neither partner knew this at the time. The receiver of the firm seeks now to set aside this sale as void against creditors.

Held, that a transfer by one member of a firm to another of his interest in that firm is valid if the firm is solvent and the transfer is made in good faith.

Finch, J.

Where one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate property; the transfer being made in good faith the title vests in the remaining partner as his own private estate, free from any lien or equity in favor of partnership creditors; and such remaining partner may lawfully transfer such property in payment of his individual debts. In this case, the good faith of the transfer is abundantly proved, and found as a fact by the trial court.

The property of O. M. Westover thus lost its character of partnership property, and became the separate property of the individual. This result is claimed to have been changed by the doctrine of this court in *Menagh v. Whitwell*, 52 N. Y. 146. We do not so understand it. It was there distinctly said that "there is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partnership debts, in preference to the separate debts of one partner; that is where a bona fide sale has been made by a retiring partner in a solvent firm of two members to his co-partner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the *corpus* of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united in a sale to a stranger." But here the purchasing partner supposed himself to be solvent, and was so believed to be by the seller. The former continued in business for five months before his failure, during which period he stood open to a levy by the firm creditors, and the offer of the retiring partner to pay the half he had assumed tended to rebut any fraudulent intent.

C. Effect of Dissolution on Property Rights and Duties of Partners.

1. Effect on Property in General.

Dyer v. Clark. 5 Metc. (Mass.) 562.

Dyer and Burleigh, transacting business under the firm name of Burleigh & Dyer, took title to real estate jointly. Dyer sues Clark, administrator of the estate of Burleigh, and his widow and heirs for selling an undivided half of the firm real estate as the individual property of Burleigh, who was found to be indebted to Dyer upon partnership accounts.

Held, that partnership real estate descends to the heirs of a deceased partner subject to the satisfaction of firm obligations.

Shaw, C. J.

There are some principles bearing upon the result which seem to be well settled, and may tend to establish the grounds of equity and law, upon which the decision must be made. It is considered as established law that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of partnership property for a partnership debt, though subsequent in time, will take precedence of a prior attachment of the same property for the debt of one of the partners. It is also considered that however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund.

When, therefore, one of the partners dies, which is *de facto* a dissolution of the partnership, it seems to be the dictate of natural equity that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased, and standing on his rights, should take exactly the same measure of justice as such partner himself would have taken, had the partnership been dissolved in his lifetime; and such interest would be the net balance of the account, as above stated.

But we are of opinion, that the object may be accomplished in equity, so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purposes of the partnership; and since this court has been fully empowered to take cognizance of all implied as well as express trusts, and carry them into effect,

there is no difficulty, but on the contrary great fitness, in adopting the rules of equity on the subject which have been adopted for the like purpose in England and in some of our sister states.

Treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound, and subject to this, all those will take, who are entitled to the property; namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner.

The result of this part of the case seems to us to be this; that when, by the agreement and understanding of partners, their capital stock and partnership fund consist, in whole or in part, of real estate, inasmuch as it is a well known rule governing the relation of partnership, that neither partner can have an ultimate and beneficial interest in the capital until the debts are paid and the account settled; that both rely upon such rule and tacitly claim the benefit of it, and expect to be bound by it; the same rule shall extend to real estate. The same mutual confidence, which governs the relation in other respects, extends to this; and, therefore, when real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them and their respective heirs, clothed with a trust for the partners, in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. It follows, as a necessary consequence, that such partnership real estate cannot be conveyed away and alienated by one of the partners alone, without a breach of such trust; and that such a conveyance would not be valid against the other partner, unless made to one who had no notice, actual or constructive, of the trust. But, if a person knows that a particular real estate is the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.

2. Title to Partnership Real Estate.

Sherrod v. Mayo. Adm. 156. N. C. 144.

Sherrod, the surviving partner of Sherrod & Brother, sues Mayo, the administrator of the deceased partner, and the heir at law, to secure possession of partnership real estate for the purpose of winding up the affairs of the partnership, all debts having been paid.

Held, that the heirs of a deceased partner are entitled to their share of the real estate of the partnership after all debts are paid.

Brown, J.

It is the doctrine of the English courts that, as between partners and their heirs and representatives for the purposes of the co-partnership, real estate will be treated as personalty if the partners have by the articles of co-partnership so treated it and impressed upon it the character of personalty.

There is no doubt that in this country co-partners may by articles of co-partnership provide that the firm's real estate may be treated as personalty and sold by the surviving partner for the settlement of the co-partnership.

In the absence of any such stipulation it was a vexed question for a long time whether, after the dissolution of the firm by the death of one of the members, the debts being paid, the share of the deceased partner should be treated as personalty and pass to the surviving partner for the settlement of the co-partnership, or descend to his heirs at law as real estate.

Where land is purchased by [a] partnership, with partnership funds, and used for partnership purposes, upon dissolution of the firm by the death of one of the partners, his share of the land descends to his heir at law as real estate, and does not pass to his representative as personalty, in the absence of any agreement in the articles of co-partnership.

Real estate belonging to a co-partnership is subject to dower of the widow of a deceased partner, subject, of course, to the payment of the partnership debts, in the absence of any provision to the contrary in the articles of co-partnership.

These decisions have settled the question in this state, and they are in accord with the great weight of authority in this country.

The American rule is that the change of character of real to personal estate is worked, if at all, only for the purpose of adjusting and settling the affairs of the partnership, and when the debts are paid the interest of the deceased partner will descend to his heirs.

3. Title to Personal Property.

Tennant v. Dunlop. 97 Va. 234.

The heirs of Tennant bring a bill to cause Dunlop, the surviving partner of Tennant & Company, to account for the use of a brand of tobacco owned by Tennant but used by the firm. Dunlop purchased from the executrix of Tennant's estate the good will of the brands of Tennant & Company, and the private brand of Tennant, under circumstances which the plaintiffs claim were a breach of duty on the part of both. The question is raised whether the surviving partner is entitled to the good will of the property.

Held, that the good will of a firm is part of its assets to be accounted for to the representatives of the deceased partner.

Riely, J.

Upon the death of a member of a partnership, the entire legal title to all the partnership property passes to the surviving partner, and he becomes invested with the exclusive right to its possession, control, and disposition, but for certain purposes. His obligations with respect thereto are threefold: (1), To convert the same into money; (2), To pay the debts of the partnership; and (3), To distribute the surplus between himself and the estate of the deceased partner. In the discharge of these obligations, the decided cases and text-writers generally maintain that, while he is not a trustee properly so called, he is nevertheless a trustee in a certain sense, and is subject to the rules and principles of equity which pertain to persons who sustain a fiduciary relation; that the creditors and the representative of the deceased partner have the right to go into a court of equity and ask for the proper fulfilment of these obligations; and that while the surviving partner and the representative of the deceased partner are not interdicted from contracting with each other with respect to the partnership estate, yet their contracts—and especially the purchase by the surviving partner of the interest of the deceased partner, on account of the generally “dangerous inequality of knowledge with respect to the subject matter of the sale”—are regarded with suspicion, will be jealously scrutinized, and only be allowed to stand, if assailed, where they appear to have been reasonable, fair, and just.

Whether or not a surviving partner is inaccurately called a trustee does not matter. There is no magic in law in a name. It is not the name which determines his relation to the representative of the deceased partner, creates his duties, and measures his responsibility, but his dominion over the partnership property, and his obligations with respect to it. In him alone is vested the title and the right of possession, and to him alone belongs the power of its disposition, but subject to accountability for its proper disposition to those interested. His obligations make it his duty, in the conversion of the property into money, to use every reasonable effort to obtain its value, in order that the debts may be paid, and a just surplus for distribution be realized. When seeking to purchase the interest of the deceased partner, instead of converting the assets into money and dividing the surplus, the relation that the surviving partner bears to the representative of the deceased partner is still in force, his obligations with respect to the assets still subsist, and they do not allow him to deal less frankly and justly. He cannot place the representative of the deceased partner at arm's length, and seek to obtain a profitable bargain for himself. Having generally a superior knowledge of the assets and their value, it is his bounden duty, in purchasing the interest of the deceased partner, to acquaint his representative with full information as to the assets, and the facts from which their value may be estimated or inferred. It is not sufficient that he does not withhold or conceal such information, but

it is incumbent on him to disclose voluntarily all within his possession or knowledge from which a sound judgment as to the value of the interest may be formed. He cannot remain passive, but must make a frank and honest disclosure.

4. Nature of Title of Surviving Partner.

Holbrook v. Lackey. 13 Metc. (Mass.) 132.

Holbrook, the surviving partner of Holbrook & Houghton, sues Lackey on a note given by him to the firm. Lackey attempts to set off a personal debt owed by Holbrook to him.

Held, that the surviving partner of a firm dissolved by death of the other members becomes the sole creditor of partnership debtors.

Shaw, C. J.

The general rule of the common law certainly is that a debt due to partners is due to them jointly; and upon the death of one, the sole right survives to the other. It is true that the survivor collects partnership debts, under a liability to account; but at law he is the sole creditor, and has the sole power to collect the debt, and to maintain a suit to recover it. And all the legal consequences resulting from this principle are held to flow from it. The surviving partner, in suing, may join a separate debt of his own. So a surviving partner, in a suit against him for a separate debt of his own, may set off a debt due to him and his deceased partner jointly. In our own courts, it has been held that a surviving partner of two firms may join demands of both in one suit. It is so far held to be his duty to do so, that he can have but one bill of cost if he brings two actions. Neither the administrator of the deceased partner, nor any creditor of the partnership, can have any suit or proceeding, in law or in equity, against the partnership debtor, unless through legal proceedings in insolvency, instituted on the application of the debtor, or of the creditors. Till then, the law makes no distinction between a debt originally due to a party severally, and a debt due to him as surviving partner. It is not the less a debt due to him in his own right, because, when collected, he may be personally liable to account for it on settlement of the partnership account, as for other payments made to him as partner.

5. Authority of Partner After Dissolution.

Gates v. Beecher. 60 N. Y. 518.

Gates, the holder, sues Beecher as indorser of a note made by the firm of Bassett, Beecher & Co. The note was presented to Bassett alone after the firm had become bankrupt. Beecher

claims that on account of the dissolution of the firm, presentment should have been made to all the members.

Held, that after dissolution, a partner still has authority to bind the firm in reference to pre-existing liabilities of the firm.

Folger, J.

Perhaps it may be said that no one of the partners can do any act in any manner inconsistent with the primary duty of winding up the whole concerns of the co-partnership. This is emphatically the case when the dissolution has been wrought by the bankruptcy of the firm, for then the effects thereof have passed into the control of the court, and all payments therefrom or chargeable thereon are to be in the direction of the court, or according to its rules and practice. The principle on which a partner, during the existence of a partnership, may by his act bind his co-partners, is that which governs the relation of agent and principal. The power of an agent to bind his principal ceases when the agency is ended; so that even payment by a former agent of a valid debt against his former principal, gives him no right against the latter. The principle has not, however, been carried so far in the case of a co-partner. His relations with the other members of the firm have not been entirely severed. He may, from his own means, pay a valid subsisting debt against the co-partnership, and have the right to claim an allowance therefor on the settlement of the affairs, or contribution from the others. And a general statement has been made by a text writer of repute that every act of administration which is necessary for winding up the concern may be effectually done by one partner, and the rest be bound. And the author expressly includes in this a case of dissolution by bankruptcy, though it is apparent that the property of a bankrupt concern may not be meddled with by one of its former members. But it is clear that the relations of the individual members of the firm are not, by a dissolution thereof, so completely severed as that no act of one can have any effect upon the others. Each and all have still an interest in the settlement of the affairs of the firm, in the payment of its debts, and the adjustment of the liability of each to it and to each other, and in the just division of any surplus. Though the co-partnership be insolvent, as in this case, and it be declared bankrupt, the members individually may be solvent, and liable to be affected by the final result of the bankrupt proceedings. And so there does, after a dissolution, still continue that common interest in past transactions, and in the present and future legitimate consequences therefrom, as that a joint power and authority in relation thereto continues; and while, after dissolution, no member of the late firm can by his act create a new liability against his former co-partners, or bind them to an alleged liability, or revive an extinct one, he may do some acts which shall affect and be binding upon them, when such acts are confined to matters in which they all still have a common interest and are under a common liability.

Thus, it has been held that one who was once a member of a dissolved partnership which, in its lifetime, had indorsed a note in the firm name, might, after dissolution, waive demand of payment and notice of non-payment; which decision was put upon the principle that, though dissolution revoked all power to make a new contract, it did not revoke the authority to arrange those before created and yet subsisting. And it being so, that the act of one of former partners, in relation to a valid subsisting liability of the late firm, does affect the others, and is taken as their act, and his knowledge thereof as their knowledge, there seems no reason why the refusal of one to pay, on demand, a note of the partnership, should not be deemed to be the refusal of all, and all be chargeable therewith. And then a demand of payment made to one, is a demand of payment made to all, and is sufficient upon which to give notice of non-payment to their indorser.

6. Authority of Surviving Partner.

Emerson v. Senter. 118 U. S. 3.

Moore, the sole surviving partner of Butler & Company, made an assignment for the benefit of creditors of the firm. This suit was between Emerson, to whom Moore assigned, and creditors of the firm who attached the property and as plaintiffs seek to enforce the attachment. The question turns upon the validity of the assignment.

Held, that a surviving partner may assign for the benefit of creditors.

Harlan, J.

When the partnership is dissolved by the death of one partner, the surviving partner is entitled to the possession and control of the joint property for the purpose of closing up its business. To that end, and for the purpose of paying the joint debts, he may, according to the settled principles of the law of partnership, administer the affairs of the firm, and, by sale or other reasonable disposition of its property, make provision for meeting its obligations. He could not otherwise properly discharge the duty which rests upon him to wind up the business, and pay over to the representative of the deceased partner what may be due to him after a final settlement of the joint debts. It is true that, in many cases—where, for instance, the surviving partner is not exercising due diligence in settling the partnership business, or is acting in bad faith—the personal representative of the deceased partner may invoke the interference of a court of equity, and compel such a disposition of the partnership effects as will be just and proper; this, because, as between the partners, and therefore, as between the surviving partner and the personal representative of the deceased partner, the joint assets constitute a

fund to be appropriated primarily to the discharge of partnership liabilities, though not necessarily, and under all circumstances, upon terms of equality as to all the joint creditors. But, while the surviving partner is under a legal obligation to account to the personal representative of a deceased partner, the latter has no such lien upon joint assets as would prevent the former from disposing of them for the purpose of closing up the partnership affairs. He has a standing in court only through the equitable right which his intestate had, as between himself and the surviving partner, to have the joint property applied in good faith for the liquidation of the joint liabilities. As with the concurrence of all of the partners the joint property could have been sold or assigned, for the benefit of preferred creditors of the firm, the surviving partner—there being no statute forbidding it—could make the same disposition of it. The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference—the local law not forbidding it—cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exertion of power by Moores, the surviving partner.

7. Limitations on Authority of Partners After Dissolution.

Hart v. Woodruff. 24 Hun (N. Y.) 510.

The firm of Woodruff & Robinson dissolved at a time when they were indebted to Hart, the plaintiff. Robinson rendered an account to Hart without the knowledge of Woodruff, and Hart now seeks to hold Woodruff upon the account stated. Woodruff contends that Robinson had no power to bind him by an admission as to the amount due.

Held, that after dissolution, one partner cannot bind the others by admissions.

Dykman, J.

During the continuance of a co-partnership, each member of the firm, within the scope of the partnership, is deemed the authorized agent of all his associates, but this presumed agency ceases, for most purposes, with the termination of the partnership, and only continues for such purposes as are necessary in winding up the business of the association. After dissolution, there is no power to make new promises or contracts or admissions in the name of the firm, even though they do not increase the prior obligation of the partners. The only power thereafter remaining to act for the firm is to sell and dispose of the property, collect, adjust and pay debts, and give discharges and acquittances. Particularly is it well settled that the

dissolution of a firm annuls the power of the respective partners to contract new debts or create new obligations against the co-partnership. After dissolution of co-partnership, the power of one partner to bind the other wholly ceases. There is no reason why his acknowledgment of an account should bind his co-partners any more than his giving a promissory note in the name of the firm, or any other act. The plaintiff ought to have produced further evidence of the debt.

8. Necessity of Notice by Retiring Partner.

Thayer v. Goss. 91 Wis. 90.

A. J. Goss and Putnam did a milling business under the firm name of Putnam & Company. Notice of dissolution was published, stating that thereafter the business would be carried on under the firm name of J. B. Goss & Company. The partnership property was conveyed to J. B. Goss, and A. J. Goss had no further interest. The plaintiff sues A. J. Goss and J. B. Goss upon a note taken from J. B. Goss & Company in cancellation of a note of Putnam & Company under the belief that A. J. Goss was still a member of the firm.

Held, that in order to release himself from new liability, a retiring partner must bring home to old customers by actual notice the fact that he is no longer a member of the firm.

Pinney, J.

The familiar and well settled rule is that a dissolution of the co-partnership by act of the parties, whether a complete discontinuance of the concern or the retirement of a single partner or addition of a member, does not affect the outside world unless proper notice is given; that actual notice must be brought home to former customers or those who are creditors by having dealt with it, but notice by publication is sufficient as to all others. The plaintiff must be regarded as a former customer or dealer with the firm of J. D. Putnam & Co., and, as such, entitled to actual notice, she having loaned them money, though but in a single instance, for which she was then their creditor. She comes within the reason of the rule.

The ground upon which notice of the discontinuance of the concern by act of the parties, or the retirement or addition of a member, is required, is stated as arising from a species of estoppel to deny the continuance of the agency of each of the partners for the firm, or on the ground of negligence whereby credit is given, or from a presumption of a continuance of the former relations, giving to one who once knows of the existence of a firm the right to assume that it remains the same, so that, until proper notice of dissolution, a partner's attitude is like that of a partner by holding out.

The proposition is laid down that when the change of name is

relied on it "must indicate the retirement of the particular partner sought to be held, for otherwise, though it be a dissolution of the identical partnership, it is also notice of a new one, in which all the former members may be presumed to continue." We regard this rule as eminently practical and just, and it has the sanction of high authority. When a business is carried on by three or more as partners, and one withdraws, or one is added, or both, and notice thereof given, and the business is carried on as before, those as to whom no notice is given must be presumed to hold the same relation to the concern that they did before; and such change furnishes no presumption that the others have ceased to be partners. If the plaintiff knew that [one partner] had withdrawn and ceased to be a partner, it was not in law a notice to the plaintiff of the dissolution of the partnership as to all its members, to the effect contended for and to the purpose for which that proposition was advanced, namely, to exempt the other members from liability. Or if it was, in a certain sense, evidence and notice of the dissolution of the same identical partnership that existed before, it was at the same time evidence and notice of the formation of a new partnership among all the remaining members of the firm to carry on the same business, holding the same relation to its customers and the public, with the single exception implied from the fact that the retiring member will be no longer liable for new contracts and that the acceding partner will thenceforward become liable.

It must be held, we think, that the notice in this case was an assurance or holding out to the plaintiff and former dealers that the business would be carried on under the new name of J. B. Goss & Co.

9. To Whom Actual Notice Must be Given.

Askew v. Silman. 95 Ga. 678.

Mrs. Silman sues Askew, seeking to hold him as a member of the firm of Austin & Company upon a firm note dated two years and a half after he had withdrawn, from the firm. At the time of his withdrawal an announcement to that effect was published in the paper to which Mrs. Silman was a subscriber, but she did not see the notice nor did she have knowledge of the dissolution of the firm. She supposed that Askew was still a member. She had been a customer of the firm as a purchaser of goods during Askew's connection with it, but had not been a creditor before the date of the note.

Held, that an outgoing partner is relieved of liability to all except creditors, by publication of notice of dissolution.

Simmons, C. J.

The court, in certain instructions to the jury which are complained of by the plaintiff in error, charged them in effect, that

if the plaintiff was a "customer" of the firm, she would be entitled to actual notice of the dissolution. We think the court erred in so charging. In order to relieve an ostensible partner from liability for debts contracted in the partnership name subsequently to his withdrawal from the firm, the dissolution must be made known "to creditors and to the world," but it is not necessary that the notice should be actual or personal except to creditors. Although it is often said in text-books and decisions that actual notice or knowledge of the dissolution must be brought home to former "customers" of the firm, this language has reference only to creditors. A customer in the sense in which the term was used in this case,—that is to say, one whose dealings with the partnership have been confined to the purchase of its goods, is entitled only to such notice as should be given to "the world."

As to the notice which should be given to "the world," no inflexible rule can be laid down. Publication in a public gazette circulated in the locality in which the business of the partnership has been conducted, if such publication is fair and reasonable as to its terms and the number of times it is made, is usually sufficient notice to the world. An editorial notice, not signed by any member of the firm, may be as effectual for this purpose as an advertisement purporting to issue by authority of the partners over their signature. Whether this is so or not is generally a question for the jury, and the court in the present case erred in charging, as a matter of law, that such notice would not be sufficient. "It is not an absolute, inflexible rule that there must be a publication in a newspaper, to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard—as, by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership—are proper to be considered on the question of notice." It should be left to the jury to say whether the retired partner made a reasonable and bona fide effort to acquaint the public with the fact of his retirement, and whether on the other hand the creditor, with the means and opportunity afforded him, knew or ought to have known of the fact. Even in the absence of any showing that notice of the dissolution was given, the fact that a considerable time elapsed between the dissolution and the contracting of the debt has been deemed sufficient to render the creditor chargeable with notice. Certainly this fact would go far to show that the debt was not or ought not to have been contracted on the credit of a former partner.

10. Liability of Incoming Partner.

Wood v. Macafee. 172 N. Y. S. 703.

D. J. and S. B. Macafee, partners, admitted Fox to a third interest in the firm upon his contributing a certain amount of capital. This action is brought against all the defendants upon

a note originally made by the two Macafees to the plaintiff, but renewed after Fox came into the firm. The question arises whether they may hold Fox upon this note, as they did not know that he had become a member.

Held, that an incoming partner who agrees to the assumption of firm indebtedness may be held upon a previous firm debt.

Cole, J.

The rule is elementary that an incoming partner is not liable for the outstanding debts of the firm, in the absence of an agreement on his part, either express or implied, to assume such indebtedness.

It is equally clear that such incoming partner may make himself liable for such debts by agreement to assume generally the existing indebtedness of the firm; and this is particularly so where assets of the old firm or of individual members thereof, to which the creditors of the outgoing firm have the right to resort, are brought into the new firm.

Such agreement need not be contained in the instrument itself (the articles of co-partnership), but may be found outside thereof and may be inferred from facts and circumstances.

When Fox came into the firm, he knew that the firm was indebted to various persons, and that the Macafees had not the means to pay the bills or to meet current expenditures. He must have known that these bills would have to be met or secured, if the new firm expected to be able to continue the business. The indebtedness of the firm was in fact discussed. The purpose of Fox's being taken in, upon his advancement of \$5,000, was to provide funds with which to meet the expenditures and to liquidate the indebtedness. He says himself that he knew they were in debt.

It was the mutual understanding between the Macafees and Fox that the new firm was to assume and pay off the outstanding indebtedness. If so, under the authorities Fox became liable equally with them for this indebtedness.

II. Effect of Sale of Good Will Upon Right to Compete.

Hutchinson v. Nay. 187 Mass. 262.

The administratrix of the estate of Hutchinson, a partner in the firm of Nay & Company, brings a bill to force Nay to account for the proceeds of the sale of the good will of the firm. For nearly two years after Hutchinson's death, Nay had conducted the business as his own and had himself built up an independent good will.

Held, that upon a sale of the good will of a partnership dissolved by death, the right of the surviving partner to compete cannot be taken away.

Loring, J.

The law of good will is of recent growth. One hundred years ago it was the law of England that the good will of a partnership survived for the benefit of the living partner. That is not so there to-day. To-day, on the contrary, in England on the death of a partner, the executor or administrator of the deceased partner can have the good will sold as one of the assets of the firm. In the growth of the law of good will in England an anomaly has crept in, which has not obtained here, that is, that one who has voluntarily sold the good will of his business can set up a competing business but cannot otherwise derogate from his grant. It was held that the result of working out the conflicting rights of the vendor and the purchaser of the good will of a business was thus: The vendor can set up a competing business but he cannot solicit business from customers of the old firm. *Jessel, M.R.*, felt the anomaly which was involved in a rule which said to the vendor of his good will: You shall not derogate from your grant and so are forbidden to solicit business from customers of the old firm, but you may deal with them if they voluntarily come to you; and he enjoined such vendor from dealing with the customer of the old firm. This gave rise to a variety of opinions which were finally set at rest by the decision of the House of Lords in *Trego v. Hunt*, (1896) A.C. 7. But in delivering his opinion in *Trego v. Hunt*, Lord Herschell said: "These circumstances appear to me to afford an indication that the courts recognized that their view of what was meant by 'good will' and the effect of a sale of it differed from the popular conception. Where the good will of a business is not sold but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that whenever the good will of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business."

What Lord Herschell there suggests might have been held in England has been held to be the law in Massachusetts. In Massachusetts the vendor of the good will of his business cannot set up a competing business at all, if by so doing he would derogate from his grant.

But where a sale of partnership assets is forced upon the survivor by the administrator of a deceased partner, the surviving partner is not in the position of a sole trader who voluntarily has parted with the good will of his business. He is not bound to retire from business as a sole trader impliedly elects to do by voluntarily

selling his good will. A sale of good will forced upon the surviving partner is like the sale of the good will of a sole trader by his trustee or assignee in bankruptcy. In that case it has been held in England that the bankrupt can not only set up a competing business, (a thing which may be done in England where a sole trader voluntarily sells the good will of his business as has been shown,) but he may solicit business from his old customers, a thing which in England cannot be done in case of a voluntary sale. No injustice is done to the estate of a deceased partner by this rule. If the estate gets all that the creditors of a sole trader can get, full justice is done to it, while to put the surviving partner in the position assumed by a sole trader who voluntarily has elected to sell his good will would be an act of great injustice. The law in England in this connection seems to be otherwise.

For these reasons we are of opinion that if a sale of the firm's good will had been asked for and ordered in the case at bar, it would have been directed to be conducted on the footing that the surviving partner was at liberty to enter on a competing business and to solicit trade from the customers of the old firm.

Where, therefore, the defendant in the case at bar, for a year and eleven months after the death of Hutchinson, carried on business at the old stand, with customers of the old firm, there being only slight changes in the personnel of the customers, and then sold the good will of his business, with a covenant to continue in the employ of the purchaser for six months and to do all in his power to hold the customers for the purchaser, and with another covenant not to engage in the teaming business for five years within the district covered by the old business, the good will sold was not the good will of the old firm but the good will of the defendant, and there is no obligation to account for even a nominal sum.

12. Effect of Sale of Firm Name.

Bagby & Rivers Company v. Rivers. 87 Md. 400.

Rivers seeks to enjoin the Bagby & Rivers Company from using the name "Rivers" as part of its corporate name. Bagby and Rivers had been in partnership under the firm name of Bagby & Rivers, and had dissolved by mutual consent. By the terms of the agreement of dissolution, Bagby was given the right to continue the use of Rivers' name. The question is whether Bagby can transfer that right to the corporation.

Held, that the sale to a partner of the right to use the former firm name does not authorize him to assign it further.

Briscoe, J.

Has a continuing partner who has acquired the right to use the name of a retiring partner, either by a grant in express terms or

by legal inference arising from the purchase of the good will of the old firm, the right to assign the use of the retiring partner's name to a corporation formed for the purpose of continuing the same business?

We are of the opinion, after a careful examination, that the contention of the appellant in respect to the assignability of the rights under this contract cannot be sustained, either from the intention of the parties, as manifested by the agreement itself, or by the law applicable to the case.

Where the contract is for the sale of or the right to use a fictitious name, or a trade-name or a trade-mark, or a corporate name, though composed of individual names, or where the good will of a business includes the right to use names of that character, then such right is assignable by the purchaser and follows the business. But where the contract merely gives to one person the right to use the name of another, as in this case, such right is personal, and in the absence of an express stipulation, cannot be assigned or transferred by the purchaser to a third party. In this case it was stipulated that Bagby should have the right to continue the business under the old name of Bagby and Rivers. It was not agreed that Bagby and his executors, administrators or assigns or a corporation [should use the name] but in the language of the contract, "he will permit the said Bagby to continue the use of his name in the style of the firm." If more had been desired it should have been agreed upon and expressed in the contract. This court cannot infer from the language used, that Bagby was entitled to transfer to a corporation the right which Rivers had conferred upon him personally. On the contrary, we think, the meaning of the contract between the parties is, that so long as Bagby continued to conduct the business in the firm name of Bagby & Rivers he had the right to use the name Rivers, but when this stopped the right to use the name of Rivers also ceased.

D. Winding Up Partnership.

1. Order of Distribution of Assets.

Groth v. Kersting. 23 Col. 213.

In an action by Kersting and Wilmsmeier against Groth for an accounting of the funds of the firm of which all three were members, the decree failed to provide that each partner should be repaid his contribution to the business. From this decree Groth appeals.

Held, that although contributions of capital are ordinarily to be repaid upon dissolution of the firm, an agreement to another effect may be made.

Hayt, C. J.

Undoubtedly, the usual order of distribution of the assets of a co-partnership upon dissolution is as stated by counsel, to wit:

- 1st. Payment of the debts or liabilities due third persons.
- 2d. Repaying to each partner his advances.
- 3d. Repaying to each partner his capital.
- 4th. Division of the balance as profits.

While this is the usual order, it may be altered by agreement of the parties, and in this case we think, from the evidence and the conditions under which the co-partnership was formed and the firm business transacted, the referee correctly determined that the amount contributed by the several partners was to be considered as assets of the firm, and to be distributed accordingly.

In accordance with the terms of the agreement, Kersting and Wilmsmeier were to devote their time and attention to the joint enterprise, and contribute only \$3,650.50, while Groth contributed \$8,000. although he had but a one third interest in the business. This disproportionate amount was, we think, put in by Groth against the lease theretofore secured by Kersting & Co., and as an offset to their labor and services in the management of the business, with the further benefit to Groth resulting from an agreement to furnish brick for his building contracts at a lower price than they could be purchased for in the market. So we conclude that it was not error for the referee to treat these several items as assets of the co-partnership, to be divided between the partners according to their interest in the co-partnership, without regard to the ratio of the original contributions.

2. Profits and Contributions of Capital.

Johnson v. Jackson. 130 Ky. 751.

Johnson and Jackson were partners in a saloon business which was sold to Jarboe. Jackson furnished the whole of the capital. He now seeks to recover from Johnson that half of the purchase price which Jarboe paid directly to Johnson, as the entire amount was less than the original contribution by Jackson.

Held, that contributions of capital to the firm are to be repaid to the partners so contributing regardless of the way in which they share profits.

Clay, C.

The law of partnership is well settled that, where the question is one of the division of profits, the presumption is that the profits are to be divided equally. Furthermore, such equality will be presumed, notwithstanding the fact that the [contributions] to the firm capital are not equal, and whether the partners are or are not on a par in regard to skill, connection, or character, or whether they

have or have not labored equally for the benefit of the partnership. However, when the question is one of the division of the partnership capital, the same presumption does not arise. With regard to the view sometimes stated that time, labor, and skill expended by a partner in the partnership business constitute his capital, it would seem that, while these may form a consideration for the partnership contract, they should not properly be called capital, as they give to such partner no rights in the final distribution of the firm capital. In accordance with this rule a partner who furnishes no capital, but contributes merely his time, skill, and services to the partnership business, is not entitled, on dissolution, to any part of the firm capital, but must look for his compensation for such time and services to his share of the profits of the firm business. It is also the established rule that excess of capital advances should be restored from the firm assets to the partner advancing, and that unequal contribution is sufficient to contradict the idea of equal division of the capital.

3. Loans Made by Partners.

Leserman v. Bernheimer. 113 N. Y. 39.

Leserman brings an action against Bernheimer and Goldsmith, his partners, upon dissolution of the business which the three had been conducting under the name of the Oleophene Oil Company. The original capital was \$225,000, of which each contributed \$75,000. At the time of dissolution, Leserman had withdrawn about \$10,500; Goldsmith had drawn out the whole of his contribution and owed the firm about \$900; while Bernheimer's share had increased about \$56,000. After paying the liabilities there remained about \$129,000, concerning the disposition of which the issue arises.

Held, that loans made by partners to the firm are to be repaid before assets are divided.

Danforth, J.

The interest of each partner in the partnership property is his share in the surplus after the partnership accounts are settled and all just claims satisfied. In this case, by the terms of the partnership, the partners were to contribute equally and divide profits and share losses equally from the beginning of the partnership to its dissolution. There is no evidence which requires or would permit any finding that this arrangement had been changed, nor are we referred to such finding. It would seem to follow that the division of profits and charge of losses should be in the proportion of one-third of each to each partner. To carry out that mode of adjustment as the one provided by the agreement of the parties, the advances made by either partner beyond the capital called for by that agreement should be treated as a debt due from the firm and

paid out of the surplus before any division is made upon the partnership capital.

If that advance was not in strictness to be regarded as a debt during the existence of the firm, nor until the debts of the firm to third persons were satisfied, it came into that relation the moment those debts were paid, and the concern, as regards its business and its outside obligations, wound up. This is an equitable disposition of the matter, for otherwise the larger the advance made for the firm the greater would be the share of losses, or if profits, the greater the share of profits accruing to the partner making the advance, in either case a result entirely opposed to the actual agreement of the parties, which exacted equality in both respects.

"In taking the account between them upon an ordinary dissolution, each becomes chargeable with all the debts and claims which he owes to the partnership, and if any partner has made advances to the firm, and others have received advances from it, these do not constitute debts until the concern is wound up." After the amount of profit and loss had been ascertained, the partner advancing might have his remedy, and the party who had overdrawn be subject to liability. Before dissolution and accounting, the one who had advanced money could not compel payment by suit against the firm, for he was one of the firm and so one of the parties owing the money. After dissolution, and before account taken and payment of debts due to others, he could not enforce payment, for the dissolution worked no change in his position. But after these events happened, he became entitled to be paid the sum advanced before the moneys contributed to the firm were returned to the contributors.

Bernheimer was a contributor to capital; he was also in advance of that contribution, and the sum advanced must be repaid before the surplus can be ascertained; and from that surplus alone can there be distribution—then to each partner equally; and, if a loss is incurred, its ratio must be ascertained as originally agreed by the parties. The referee has not dealt with the appellant Bernheimer in accordance with these rules. He gives him one-third only of the surplus by reason of his original capital, and in accordance with the same theory the referee gives one other third of the surplus to Leserman, and the remaining third to Goldsmith. This method would be well enough if the surplus were sufficient to pay all. But it is not, and, moreover, the advance made by Bernheimer is left entirely unpaid. To cover it, therefore, the sum advanced is divided into three parts, and Bernheimer is given a judgment against Leserman for \$18,873.72, or one-third; a judgment against Goldsmith for a like amount, or one-third, leaving him to bear a certain loss as to the remaining one-third, and imposing on him the risks of collection as against Goldsmith. We think this result is inequitable and not required by any rule or principle of law.

The sum advanced by Bernheimer over his \$75,000 should be first paid from the partnership surplus, and the residue divided among the partners according to the partnership agreement. Of

course, Goldsmith, having drawn out his whole capital, could be entitled to no part of the surplus, and Leserman's share would be diminished by reason of the sum already drawn by him. The losses entailed upon the firm by reason of Goldsmith's overdrafts of capital or otherwise must, of course, be borne equally.

4. Sharing of Losses.

Whitcomb v. Converse. 119 Mass. 38.

Articles of co-partnership for the transaction of a commission business between Converse, Whitcomb, Blagden and Stanton provided that Converse should contribute \$25,000 and Whitcomb, \$50,000, the entire capital of the firm; that Converse should contribute such time as he might be able to give, and the others all of their time to the business; that each partner should receive one-fourth of the net profits; and that Converse and Whitcomb should receive interest on the capital contributed by them. The partnership was afterwards dissolved by mutual consent and the business sold at a loss. Whitcomb brings a bill to compel contribution by the other partners.

Held, that the capital of a firm is a debt of the partnership to which all the partners are bound to contribute equally.

Gray, C. J.

In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged; any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this

obligation, all the partners must bear it in the same proportion as other debts of the partnership.

In the case at bar, the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital, in unequal proportions. Converse was to contribute "such time as he may be able to give"; and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by express agreement to receive interest thereon at rates specified in the articles of co-partnership. The partners were by agreement to receive each one-fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse respectively for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions.

5. Rules for Distribution Under Uniform Partnership Act.

Laws of New York, 1919. Chapter 408. Article 6.

Section 71. Rules for distribution. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

- (a) The assets of partnership are:
 - I. The partnership property,
 - II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this subdivision.
- (b) The liabilities of the partnership shall rank in order of payment, as follows:
 - I. Those owing to creditors other than partners,
 - II. Those owing to partners other than for capital and profits,
 - III. Those owing to partners in respect of capital,
 - IV. Those owing to partners in respect of profits.
- (c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.
- (d) The partners shall contribute, as provided by section forty, subdivision one, the amount necessary to satisfy

the liabilities ; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

Chapter VII.

CORPORATIONS.

I.

ORGANIZATION AND POWERS.

A corporation is an association of persons, organized under the authority of the state, by whose sanction it becomes a legal entity, endowed with capacity of continuous succession, and with power to act in many respects as a single individual.

1. A corporation possesses a legal individuality separate and distinct from that of the members who compose it.

- a. Title to property conveyed to the corporation is in it and not in its members.
- b. Officers chosen by the stockholders represent the corporation as such and are not agents of the stockholders. It is the corporation, not the stockholders, which is bound by the acts of the officers.
- c. Contracts and debts of the corporation are its contracts and debts, and stockholders are not personally liable thereon, except by statute, or under special circumstances.
- d. The stockholders may enter into contracts with the corporation and may sue and be sued by it.

2. A corporation is created by the state and hence has those powers, and only those, which the state confers. These include the following general powers:

- a. To have perpetual succession in its corporate name unless the period for its duration is limited by law.
- b. To sue or be sued in its corporate name.
- c. To have capital stock to such an amount as may be fixed in its agreement of association, or articles of organization, or of amendment thereto.
- d. To have a corporate seal, which it may alter at pleasure.

- e. To elect all necessary officers, fix their compensation, and define their duties.
- f. To hold, purchase, convey, mortgage or lease in the name of the corporation such real or personal property as the purposes of the corporation may require.
- g. To make contracts, incur liabilities, and borrow money on its credit and for its use.
- h. To make by-laws not inconsistent with law for regulating its government and for the administration of its affairs.
- i. To be dissolved or to have its affairs wound up.

As a corporation owes its existence to the state, it must conform to the requirements established by the state in order that it shall acquire the necessary attributes of a legal person distinct from the members who compose it. When a corporation is defectively organized in any detail, questions often arise concerning its status. In this regard, a corporation *de facto* is to be distinguished from a corporation *de jure*. The term *de facto*, as applied to a corporation, indicates a body which actually exists for all practical purposes as a corporate body, but which, because of failure to comply with some provision of the law, has no legal right to corporate existence as against the state. A corporation *de jure*, on the other hand, is a corporation in law as well as in fact. Not even the state can deprive it of its corporate existence in violation of the terms of its charter.

At times it is difficult to determine what constitutes a corporation *de facto* as distinguished from an association which pretends to be a corporation, but which has no corporate existence at all, either *de jure* or *de facto*. In order to establish a *de facto* corporation with the same powers and duties as a *de jure* corporation in respect to everyone except the state, three requirements must be met. There must be:

1. A valid law under which the particular corporation may be legally organized.
2. An attempt in good faith to organize the corporation.
3. A user of corporate functions.

When the corporation performs an act which is beyond the powers conferred by the charter, this act is said to be *ultra vires*. As long as *ultra vires* contracts remain executory, they cannot be enforced either by or against the corporation. By the better rule, however, when an *ultra vires* contract has been performed by the one party so that benefit has been received by the other, an action to recover the value of that benefit may be maintained

When the *ultra vires* act is beyond the powers of the corporation because of the fact that it represents an abuse of powers which the corporation might exercise for proper purposes, the fact of *ultra vires* is never a defense against persons who have dealt with the corporation in good faith and without notice.

A. Nature of Corporations.

1. Definition.

The Trustees of Dartmouth College v. Woodward. 4 *Wheat.* (U. S.) 518.

In 1769, George III, King of England, granted to the trustees of Dartmouth College a charter fixing their number and defining their duties. In 1816, the legislature of New Hampshire passed an act amending the charter of the College, whereby, among other changes, the number of trustees was increased; trustees might be appointed by the governor; and a Board of Overseers was created. The original trustees refused to accept this amended charter, and bring suit to regain possession of certain property belonging to the college.

Held, that in the absence of a reservation in the grant, a corporate charter is a contract which cannot be amended at the pleasure of the sovereign.*

Marshall, C. J.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use.

By these means, a perpetual succession of individuals are capable

* Statutes now in force authorizing the organization of corporations almost invariably contain provisions for the repeal or amendment of the charter.

of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be.

Washington, J.

A corporation is defined by Mr. Justice Blackstone to be a franchise. It is, says he, "a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise, or freedom." To this grant, or this franchise, the parties are, the king, and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. The subjects of the grant are not only privileges and immunities, but property, or, which is the same thing, a capacity to acquire and to hold property in perpetuity. Certain obligations are created, binding both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it. There is also an implied contract, that the founder of a private charity, or his heir, or other persons appointed by him for that purpose, shall have the right to visit, and to govern the corporation, of which he is the acknowledged founder and patron, and also, that in case of its dissolution, the reversionary right of the founder to the property, with which he had endowed it, should be preserved inviolate.

The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and of making by-laws. The obligation imposed upon them, and which forms the consideration of the grant, is that of acting up to the end or design for which they were created by their founder. The grant of incorporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration of the privileges bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end of the compact. The charter of a corporation, says Mr. Justice Blackstone, may be forfeited through negligence, or abuse of its franchises, in which case the law judges, that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void.

It appears to me, upon the whole, that these principles prove, incontrovertibly, that a charter of incorporation is a contract.

2. Essential Elements.

Thomas v. Dakin. 22 Wend. (N. Y.) 9.

Thomas, as President of the Bank of Central New York, sues Dakin as a party to three bills of exchange discounted by the bank. A statute authorizes the bringing of such a suit in the name of the president. The defense is that the statute is unconstitutional, on the ground that the legislature could not authorize a corporation to sue in any name other than its own.

Held, that while a corporation must ordinarily sue in its corporate name, legislative authority to sue through an officer may be given.

Nelson, C. J.

A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term corporation in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been said that a corporation aggregate is an artificial body of men, composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation. The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the powers and faculties, which are usually specified as creating corporate existence, are:

1. The capacity of perpetual succession;
2. The power to sue and be sued, and to grant and receive in its corporate name;
3. To purchase and hold real and personal estate;
4. To have a common seal; and
5. To make by-laws.

These *indicia* were given by judges and elementary writers at a very early day: since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them, at this day, will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a common seal, or to make by-laws, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal, and as to the other, the power is unnecessary in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far

above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act in fulfilment of the objects of the association as a single individual. In this way, a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in effecting it, the operation is conducted with the simplicity and individuality of a natural person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various—limited or enlarged, at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may say with the most approved authorities at this day, that the essence of a corporation consists in a capacity:

1. To have perpetual succession under a special name, and in an artificial form;
2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and
3. To receive and enjoy in common, grants of privileges and immunities.

3. Corporation as Creature of Sovereign.

The People v. The Pullman's Palace Car Co. 175 Ill. 125.

This action was brought by the attorney general of the state of Illinois against The Pullman's Palace Car Company to obtain a forfeiture of its charter on account of alleged usurpations of power, particularly holding real estate for purposes foreign to its business of constructing railway cars and supplies.

Held, that a corporation has only those powers expressly given, and such as are necessary to carry those express powers into effect.

Boggs, J.

A corporation in our state has its existence by virtue of the enactment, general or special, of the law-making power. The appellee corporation was created by a special act of the General Assembly. The only difference between a corporation organized under a general law and one created by a special statute is, "that in the former we look to the certificate of the promoters, while in the latter we look to the special statute to ascertain the scope of the powers of the corporation." The rule for construing the instruments must neces-

sarily be the same, viz., the powers specifically enumerated, and such other powers as are incidental or necessary to carry those powers into effect, but none others may be exercised by the corporation.

The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers thus conferred it may exercise other powers, known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable and proper to accomplish the object of the grant, and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation.

4. Necessity of Acceptance of Charter.

The State v. Dawson. 16 Ind. 40.

In 1849, the legislature of the state of Indiana enacted a special charter of incorporation of the Fort Wayne & Southern Railroad. No application for such a charter had been made. The persons named in the charter as directors did not accept the charter until 1852. In 1851, the constitution of the state was changed so as to prohibit the creation of such charters by special act. This action is brought to prevent the exercise of corporate powers by the railroad.

Held, that until acceptance, the grant of a charter is a mere offer which may be withdrawn.

Perkins, J.

It is necessary for us to ascertain when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz.: acceptance of the charter enacted.

"The fundamental rule is this: no charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate."

The grant of the charter in question to those who had not applied for it, was but an offer on the part of the state; a consent that the

persons named in the charter might become a corporation, might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the state, in 1849, was withdrawn by the state, November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her legislature, would prescribe.

This pretended corporation, then, was not created before November 1, 1851; and it could be created afterward only by the concurrent consent of the state and the corporators. But, at that date, the Constitution prohibited both the state and corporators from giving consent to such a corporation, to wit: one coming into existence through a special charter; and hence necessarily prohibited the creation thereof.

5. Corporation as Legal Person.

Button v. Hoffman. 61 Wis. 20.

Button, the sole owner of all the capital stock of the Hayden & Smith Manufacturing Company, sues the defendant to replevy property belonging to the corporation. The defense is that he has no title.

Held, that stockholders have no title to the assets of the corporation.

Orton, J.

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue, and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary co-partnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestius que trust*. The right of alienation

or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder.

These principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name.

The sole stockholder of the corporation is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person.

6. Relation of Members to Corporation.

The People ex rel. Winchester v. Coleman. 133 N. Y. 279.

The respondents, the commissioners of taxes of New York City, assessed certain taxes upon the capital stock of the National Express Company, a joint-stock company, in accordance with the law relative to the taxation of corporations. This suit is brought at the instance of the treasurer of the Express Company to determine whether the taxes were properly assessed.

Held, that a joint-stock company is not taxable as a corporation.

Finch, J.

The creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force.

It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts

them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities, which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never at common law rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, but is retained by force of the express command of the statute and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily these individual liabilities exist upon other than common law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common law liability for the debts contracted. Those debts are their debts for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required in the first instance a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common law right, but recognized its existence. Even that mode of procedure has been modified by the Code, so that the creditor at his option may sue the associates without bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organization; to maintain in full force the common law liability of associates and not to substitute for it that of corporators; and preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view

of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other the joint-stock companies have been clothed with most of the corporate attributes, but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two.

We may thus see upon what the legislative intent to preserve them as separate and distinct is founded and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other, the common law liability remains unchanged and unimpaired and needing no statutory intervention to preserve or restore it; the debt of the corporation is its debt and not that of its members, the debt of the joint-stock company is the debt of the associates however enforced; the creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the state. The two are alike but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint-stock company is a corporation, we can say that a joint-stock company is a partnership with some of the powers of a corporation. Beyond that we do not think it is our duty to go.

7. Method of Incorporating Under General Act.

Massachusetts Acts and Resolves of 1903, Chapter 437.

Section 7. Three or more persons may associate themselves by a written agreement of association with the intention of forming a corporation under the general laws for any lawful purpose which is not excluded by the provisions of section one except to buy and sell real estate or to distil or manufacture intoxicating liquors.

Section 8. The agreement of association shall state:—

(a) That the subscribers thereto associate themselves with the intention of forming a corporation.

(b) The corporate name assumed.

(c) The location of the principal office of the corporation in the commonwealth, and elsewhere in the case of corporations organized to do business wholly outside the commonwealth.

(d) The purposes for which the corporation is formed and the nature of the business to be transacted.

(e) The total amount of the capital stock of the corporation, which shall not be less than one thousand dollars, to be authorized; the par value of the shares, which shall not be less than five dollars; the number of shares into which the capital stock is to be divided, and the restrictions, if any, imposed upon their transfer; and, if there are to be two or more classes of stock, a description of the different classes and a statement of the terms on which they are to be created and of the method of voting thereon.

(f) Any other provisions not inconsistent with law for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining or regulating the powers of the corporation, or of its directors or stockholders, or any class of stockholders.

(g) The subscriber or subscribers by whom the first meeting of the incorporators shall be called.

(h) The names and residences of the incorporators and the amount of the stock subscribed for by each.

Section 9. The first meeting of the incorporators of a corporation created by special law shall, unless such law otherwise provides, be called by a notice signed by a majority of the persons named in the act of incorporation; and the first meeting of the incorporators of a corporation organized under general laws shall be called by a notice signed either by such subscriber to the agreement of association as may be designated therein or by a majority of the subscribers to such agreement; and such notice shall state the time, place and purposes of the meeting. A copy of such notice shall, seven days at least before the day appointed for the meeting, be given to each incorporator or left at his residence or usual place of business, or deposited in the post office, postage prepaid, and addressed to him at his residence or usual place of business, and another copy thereof, and an affidavit of one of the signers that the notice has been duly served, shall be recorded with the records of the corporation. If all of the incorporators shall in writing, indorsed upon the agreement of association, or, in the case of a corporation created by special law, upon the charter or a certified copy thereof, waive such notice and fix the time and place of the meeting, no notice shall be required.

Section 10. At such first meeting, or at any adjournment thereof, the incorporators shall organize by the choice, by ballot, of a temporary clerk, who shall be sworn, by the adoption of by-laws and by the election in such manner as the by-laws may determine of directors, of a treasurer, of a clerk and of such other officers as the by-laws may prescribe. The temporary clerk shall make and attest a record of the proceedings until the clerk has

been chosen and sworn, including a record of such choice and qualification.

Section 11. A majority of the directors who are elected at such first meeting shall forthwith make, sign and make oath to articles setting forth:—

(a) A true copy of the agreement of association and the names of the subscribers thereto, or of the act of incorporation, as the case may be.

(b) The date of the first meeting and of the successive adjournments thereof, if any.

(c) The amount of capital stock then to be issued; the amount thereof to be paid for in full in cash; the amount thereof to be paid for in cash by instalments and the instalment to be paid before the corporation commences business; and the amount thereof to be paid for in property. If such property consists in any part of real estate, its location, area and the amount of stock to be issued therefor shall be stated; if any part of such property is personal, it shall be described in such detail as the commissioner of corporations may require, and the amount of stock to be issued therefor stated. If any part of the capital stock is issued for services or expenses, the nature of such services or expenses and the amount of stock which is issued therefor shall be clearly stated.

(d) The name, residence and post office address of each of the officers of the corporation.

The directors who sign such articles shall be jointly and severally liable to any stockholder of the corporation for actual damages caused by any statement therein which is false and which they know to be false.

Section 12. The articles of organization and the record of the first meeting of the incorporators shall be submitted to the commissioner of corporations, who shall examine them and who may require such amendment thereof or such additional information as he may consider necessary. If he finds that the articles conform to the provisions of the preceding sections relative to the organization of the corporation, he shall so certify and indorse his approval thereon. Thereupon, the articles shall, upon payment of the fee hereinafter provided, be filed in the office of the secretary of the commonwealth, who shall cause them and the indorsement thereon to be recorded, and, except in the case of a corporation created by special law, shall thereupon issue a certificate in the following form:—

COMMONWEALTH OF MASSACHUSETTS.

Be it known that whereas (the names of the subscribers to the agreement of association) have associated themselves with the intention of forming a corporation under the name of (the name of the

corporation), for the purpose (the purpose declared in the agreement of association), with a capital stock of (the amount fixed in the agreement of association, with a statement of the several classes into which the stock is divided and their respective amounts, and of the method of paying for such stock, whether by cash, in full, cash on instalments, property, or partly cash and partly property), and have complied with the provisions of the statutes of this commonwealth in such case made and provided, as appears from the articles of organization of said corporation, duly approved by the commissioner of corporations and recorded in this office: now, therefore, I (the name of the secretary), secretary of the commonwealth of Massachusetts, do hereby certify that said (the names of the subscribers to the agreement of association), their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (name of the corporation), with the powers, rights and privileges, and subject to the limitations, duties and restrictions, which by law appertain thereto.

Witness my official signature hereunto subscribed, and the great seal of the commonwealth of Massachusetts hereunto affixed, this day of in the year
(the date of filing of the articles of organization).

The secretary shall sign the certificate of incorporation and cause the great seal of the commonwealth to be thereto affixed, and such certificate shall have the force and effect of a special charter. The existence of every corporation which is not created by special law shall begin upon the filing of the articles of organization in the office of the secretary of the commonwealth. The secretary of the commonwealth shall also cause a record of the certificate of incorporation to be made, and such certificate, or such record, or a certified copy thereof, shall be conclusive evidence of the existence of such corporation.

B. Particular Kinds of Corporations.

1. Corporations Aggregate.

Hope v. Valley City Salt Co. 25 W. Va. 789.

Hope, a creditor of the Valley City Salt Company, seeks to set aside a conveyance made by the corporation to Harpold, its president, to secure him upon a contract whereby he had guaranteed the credit of the corporation.

Held, that a corporation aggregate may contract with its members.

Woods, J.

It seems to us that it cannot be successfully maintained that a corporation aggregate cannot lawfully enter into a contract with or borrow money from its own stockholders, and that if it does so, the contract entered into, the obligation executed, and the deed of trust or mortgage made to secure the same is for that cause alone fraudulent and void. Few corporations aggregate created for the purpose of carrying on any important branch of manufacturing or mining industries, have ever been formed, or will probably ever be formed, which have not been obliged in the earlier stages of development to borrow money, and frequently large amounts of money, to put the business upon a paying basis. Under such circumstances it would on business principles alone be unreasonable to expect strangers wholly unacquainted with, and uninterested in the proposed enterprise, to advance such necessary funds without security other than that of the corporation, and if to be secured by others, by whom so naturally as by the individual stockholders of the corporation, who were personally interested in, and had at least partial control over the conduct and management of its business. If such a liability be incurred to a stranger, so secured by individual stockholders, why may not the corporation further secure him and such securities by a deed of trust or mortgage on part of its property, unless prohibited by law from doing so, and if such sureties may be so secured collaterally, what good reason can be given why the loan may not be made by stockholders to the corporation, and secured by it to [them] in like manner?

This is no new doctrine, for as by the common law a corporation aggregate can contract with persons who are not members, so it may contract with persons who are members of it, and the contract will not on this account alone be invalid, as a member of a corporation contracting with it will be regarded as a stranger. The same is clearly laid down by Judge Story in the Dartmouth College case, where he says: "A corporation aggregate is an artificial person existing in contemplation of law, and endowed with certain powers and franchises, which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself as distinctly as if it were a real person." Hence such a corporation may sue and be sued by its own members, and may contract with them in the same manner as with strangers.

2. Corporations Sole.

Codd v. Rathbone. 19 N. Y. 37.

Codd, the sole owner of the Exchange Bank of Buffalo, an individual bank which was doing business under the provisions of a statute, sues Rathbone upon checks and a note. The defense is in part that Codd cannot maintain this action in his own name as he became a corporation sole in the operation of the Bank.

Held, that a person conducting a business under statutory restrictions does not thereby become a corporation sole.

Grover, J.

The remaining question arises upon the objection of the defendant that the plaintiff had not shown himself the owner of the checks drawn upon the bank and the note payable to it. This depends upon the question whether an individual banker is a corporation. If so, the checks and note were the property of the corporation, and the plaintiff could not recover in his individual character. An individual banker must be a corporation sole, if one at all. A corporation sole as defined by Kent, consists of a single person who is made a body corporate and politic in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he cannot have. The successor takes the corporate property and privileges. The general banking law confers certain privileges upon individual bankers, but nowhere in express words declares them corporations. It does not confer upon them any one essential requisite of a corporation. It is true that some of their franchises are common to banking corporations. Their notes may be circulated as money. They may transact the usual business of such corporations. All this any individual might lawfully do, but for the restraining acts. It is entirely competent for the legislature to impose upon individuals all the restrictions, in transacting other business, to which individual bankers are subjected by the act. It is not necessary to the validity of any of those restrictions to hold them corporations.

There is no provision made for succession. The right of sale and transfer of the business, with its privileges, is restrained. All these provisions show that, in the opinion of the Legislature, the banker is not a corporation.

3. Public and Private Corporations.

Trustees of Carrick Academy v. Clark. 112 Tenn. 483.

The trustees of Carrick Academy seek to have declared void a lease of property of the Academy made by former trustees to the Winchester Normal College. The lease was made under an act of the legislature giving the former trustees the necessary authority. The plaintiffs contend that the legislature could not grant this authority, as the property was dedicated to the purposes of Carrick Academy by the state, which had founded the Academy without shareholders and without specified beneficiaries.

Held, that the legislature may change the charter of a public corporation at will.

Beard, J.

The predicate upon which the complainants rest their attack upon

the act authorizing the lease to the Winchester Normal College is that Carrick Academy was a private corporation, created to administer a trust for the benefit of the taxpayers and school children of Franklin county.

In order to determine whether this assumption is sound, it is necessary to ascertain briefly the nature of corporations. While it is true there may be a corporation sole, yet the law has ordinarily to deal with the corporation aggregate, which is a collection of a few or many individuals united in a single body under a special name, endowed with the capacity of acting as one person. Such a creature is purely artificial, existing only in contemplation of law, and can neither employ its franchises nor hold its property for its own benefit. Such a corporation may be considered as a body of individuals having collectively faculties and capacities which they can employ for their own benefit or for the benefit of others, according to the purposes for which these faculties and capacities were bestowed. It is apparent that all beneficial interest both in the franchises and the property of corporations must be considered, when these corporations are reduced to their last analysis, as vested in natural persons—either in the people at large or in individuals. It is in this view that they are divided into public and private corporations.

Private corporations are those created for the immediate benefit and advantage of the individuals constituting them, and the franchises conferred are to be exercised for their advantage. The corporation stands to them in relation of trustee holding the property owned by it for, and dividing the profits arising from, its management, and the employment of its franchises for these individuals as *cestuis que trust*. Upon the other hand, public corporations are created for public purposes, and the property controlled by them is devoted to the objects for which they are created. The corporators have no private beneficial interest either in the franchises granted or the property controlled. The only private right which an individual can have in such a corporation is the right of being and acting as corporator. So far as the property of the corporation is concerned, the interest which the corporators have as individuals is that common interest which all citizens have in property belonging to the state. Nor is the character of this interest affected by the source from which the property comes. A purchase by or a gift of property to the corporation is in reality a purchase by or a gift to the public, and is to be administered by the corporation as an agency of the state.

These being the distinctive marks of private and public corporations, we think there is no difficulty in assigning the corporation in question to its proper place among the latter.

As has been seen, it had no shareholders and earned no profits in which its corporators had an interest. It was evidently organized for a public purpose. It was purely one of the educational agencies of the state, created for the diffusion of knowledge in the various communities where located. The legislation out of which sprang this and other academies of like nature, however crude, was the first effort

of the state to bring education to the door and within the means of every citizen of the commonwealth. It was the beginning of a long series of efforts, which were often abortive, but as often renewed, to establish a public school system in the state; and that which we have to-day can be historically traced to the initial acts of 1806 and 1809.

Being public agencies established by the state to subserve a public purpose, we see no more reason to doubt the power of the legislature to pass the act in question than to enact legislation to create and destroy municipalities, and to exercise control at its pleasure over the various benevolent institutions and their properties established throughout the state.

4. Quasi-Public Corporations.

McCarter v. Firemen's Insurance Co. 74 N. J. E. 372.

Eight fire insurance companies entered into an agreement whereby they fixed premium rates and indicated brokers who should handle their fire insurance business. McCarter, as attorney-general, seeks a decree to set aside this agreement on the ground that it tends to the injury of the public.

Held, that a corporation engaged in business of a public nature must serve the interests of the public.

Garrison, J.

The rule is that if a corporation, engaged in a business that is affected with a public interest, contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously and is contrary to public policy, such contract is *ultra vires* such corporation, and may be restrained in equity at the suit of the attorney-general without regard to whether or not actual injury has resulted to the public. The expression "corporation affected with a public interest" is to be preferred to the term "quasi-public corporation" as tending in some measure, at least, to characterize the class of corporations indicated, whereas the term "quasi-public" is characterized only by its unmeaning vagueness.

The first question is whether or not the business of fire insurance as carried on in this state is a business affected with a public interest. The answer to this question does not depend upon whether the defendants were expressly created as public agents, or whether the state has expressly charged them with the performance of a public duty or has to that end clothed them with monopolistic privileges or granted to them its right of eminent domain or required that they insure the property of all citizens alike. These are *indicia* by which the existence of "a public interest" may be readily discerned, but so far from "the public interest" arising out of these incidents the fundamental fact is that they arise out of such public interest. In natural course the public interest first arose, and afterwards, and

because of such interest, all of these incidents were added unto it. In their inception all public callings were private ones whose history has consisted in the evolution of a public character and of the incidents that they now possess.

It is in accordance with this principle that the entire class of callings we are considering have come into existence. Railways, ferries, inns, warehouses, or what not, have in their day had this same origin and history.

5. Eleemosynary Corporations.

The People ex rel. The New York Institution for the Blind v. Fitch. 154 N. Y. 14.

The New York Institution for the Blind sues to establish its right to payment by the Comptroller of the city of New York for clothing furnished its inmates who resided in the city. The city refuses to pay these claims on the ground that only charitable institutions are entitled to such contributions, and that as some pupils had paid their tuition, the corporation is not to be regarded as a charitable corporation.

Held, that a corporation may be partly educational, and partly eleemosynary.

Martin, J.

The relator is, doubtless, to an extent, an educational institution. But that fact alone does not justify the conclusion that it is not a charitable institution within the meaning and intent of the Constitution and statutes. An institution may be in a sense educational and at the same time be wholly or partly charitable, as the education and maintenance of indigent pupils, while being educated, may be the subject of charity as well as support alone. It need only be an institution which is wholly or partly charitable in its character and purpose.

Eleemosynary corporations are such as are instituted upon a principle of charity, their object being the perpetual distribution of the bounty of the founder of them to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent and sick, or deaf and dumb. And of this kind, also, are all colleges and academies which are founded where assistance is given to the members thereof, in order to enable them to prosecute their studies, or devotion, with ease and assiduity. The distinguishing feature of charitable corporations is that they are formed for the administration of charitable trusts, and not for the profit of the corporators themselves; for example, corporations formed for the management of free hospitals and asylums for the relief of the poor, insane, blind, or otherwise helpless. In [the class of eleemosynary corporations] are ranked hospitals for the relief of poor, sick and impotent persons, and colleges

and academies established for the promotion of learning and piety, and endowed with property by public and private donations. This word, [charitable], in the expressions "charitable uses," "charitable trusts," is understood in a very large sense [as] comprising not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and for any other useful and public purpose, as well as donations for pious or religious objects. The legal definition of charity is a gift to a general public use, which extends to the rich as well as poor, and property held for public purposes is held for charitable uses in the legal sense of the term charity.

It is doubtless true that in many of the authorities the word charitable has been given a broader and more comprehensive meaning than should be applied to it, as it occurs in the Constitution and statutes relating to the subject under consideration. We think that, in determining the question before us, it should be given only its usual and ordinary meaning, and that, when so understood and applied, the relator must be regarded as a charitable institution so far as it clothes, educates and maintains indigent pupils at public expense or by donations from individuals. So far as it educates pupils who pay for their tuition, board and maintenance, it is not to be regarded as a charitable, but only as an educational institution. As to those pupils, the board of charities has no jurisdiction or power of supervision. Being to an extent charitable as well as educational, it clearly falls within the provisions of the Constitution and statutes as an institution of a charitable character or design.

6. De Jure and De Facto Corporations.

Gibbs's Estate, Hallstead's Appeal. 157 Pa. St. 59.

Hallstead, as guardian of Clapp, attempts to secure from Gibbs's estate the amount of a deposit in the Home Savings Bank, of which Gibbs was a stockholder. Hallstead bases his claim upon the theory that the bank was a general partnership and that the stockholders were liable as partners, because of the fact that there was no record of the incorporation of the bank.

Held, that failure to prove a record of incorporation does not constitute the parties interested a partnership.

Williams, J.

First, what is a corporation? The several answers given by text writers may be reduced to the following formula: A corporation is an artificial person created by law as the representative of those persons, natural or artificial, who contribute to, or become holders of, shares in the property entrusted to it for a common purpose. As it is the creature of positive law, its rights, powers and duties are prescribed by the law. Beyond the legitimate purposes which it was created

to serve, and the lines of limitation the law has drawn around it, it is without power to act or capacity to take. Thus a banking corporation, while fully competent to do what is usual and necessary in its own business, may not own and operate a railroad, or engage permanently in any other business than that for which it was created. It has neither the legal capacity nor the right to do so; and if it undertakes to go in any direction beyond its corporate powers its acts are *ultra vires*. The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is exclusively the work of the law; and the best evidence of the existence of a corporation is the grant of corporate powers by the commonwealth.

Second: What is a corporation *de facto*? It is an apparent corporate organization asserted to be a corporation by its members and actually acting as such, but lacking the creative fiat of the law. It is said that a *de facto* corporation may exist "when a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act." Their organization may be imperfect, so that upon a *quo warranto* they could not show a sufficient compliance with the law to justify the exercise of corporate powers, but, as to parties dealing with them, and as to each other, they are estopped to deny that they are what they hold themselves out to be. In a recent case in Minnesota, it was held that a *de facto* corporation exists when these three things concur, viz.: A law under which the alleged corporation might be created; an attempt to organize under the law; an assumption and exercise of corporate powers under such attempted organization. In [a New York case] only two things were held necessary, viz.: "The existence of a charter or law under which a corporation with the powers assumed might be lawfully created; and a user by the party to the suit of the rights claimed to be conferred by such a charter or law." Where there has been a substantial compliance with the law, the corporation is, of course, *de jure*. Where there has been no substantial compliance, but there has been nevertheless an assumption and exercise of corporate powers in pursuance of an attempted organization, the alleged corporation is such *de facto* only. The Minnesota courts hold the correct rule, and three things are necessary to create the liability: a law or charter under which an organization *de jure* might be effected; an attempt to organize which falls so far short of the requirements of the law or charter as to be ineffectual; an assumption and exercise of corporate powers notwithstanding the failure to comply with the law or charter.

We can extend protection to [depositors in the bank] in accordance with the established rules of law, and in no other manner. What the Home Savings Bank was in its organization, in what capacity those who held its stock were liable to its depositors, are questions not now before us. It may have been a corporation *de jure*, a corporation *de facto*, a joint-stock association, or a general partnership, so far as we are able to declare. What we say is that the evidence in this case is not sufficient to make a case, *prima facie*,

against Henry Gibbs as a partner, or the bank as a general partnership. It does not appear that the bank was organized as a partnership, conducted business as a partnership, or held itself out to the public as such. It does not appear that Gibbs understood the bank to be other than what his certificates of stock indicated; or that he treated the business of the bank as that of a firm, or exercised the slightest control over, or influence upon it; or misled the appellant or any other depositor by act or word as to his relation to it. What does appear is that he purchased shares of stock in the usual manner, and received some dividends thereon. These circumstances are naturally referable to the relation of a stockholder to a corporation; and, standing alone, are not proof, *prima facie*, of the appellant's proposition that the bank was organized as a partnership, and that the purchase of shares of stock made Gibbs a partner. If he had received profits from a business apparently conducted by a partnership, he would have been put upon his explanation, and, failing to make one, would have been held to be a partner. The burden in that case would have been on him. Having received dividends, declared by a board of directors upon the stock into which the capital of the bank was divided, he could rest securely upon the apparent character of the transaction and the inferences naturally to be drawn from it. The burden of explanation necessary to give another character to the dividend declared, and to the stock on which it was paid, was on him who asserted that such other was the true character of these circumstances.

7. Nature of De Facto Corporation.

Society Perun v. Cleveland. 43 Oh. St. 481.

The city of Cleveland conveyed real estate, on which it took a mortgage to secure the unpaid purchase price, to the Society Perun, an unincorporated school and library which had taken certain steps toward incorporation and had for nearly six years acted in good faith as a corporation. Before the city's mortgage was filed, the society, purporting to act as a corporation, transferred this property. The city seeks to avoid this conveyance on the ground that the society was not a corporation and that its acts were void.

Held, that a *de facto* corporation may contract as if it were a *de jure* corporation.

Owen, J.

The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation.

It is a self-evident proposition that a contract cannot be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible, in the nature of things, as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least *de facto*, at the time the contract was made.

It is bound by all such acts as it might rightfully perform as a corporation *de jure*. Where it has attempted in good faith to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.

The public and all persons dealing with this society were justified in assuming that the certificate filed with the secretary of state, and by him admitted to record in his office, had been approved by him, and also by the attorney-general, as required by statute, and that it so far conformed to all legal requirements that, as provided in section 2 of the act of incorporation, "a copy, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such association."

The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity, and all of its transactions void.

8. Necessity of Valid Law to De Facto Corporation.

The Imperial Building Co. v. The Chicago Open Board of Trade. 238 Ill. 100.

The plaintiff, the Imperial Building Company, sues the Board of Trade upon a lease made by it to the Board of Trade. The defendants raise the defense that the plaintiff is a corporation organized for the purpose of holding real estate, which is unlawful according to the law of Illinois. The Building Company insists that it is in any event a *de facto* corporation for this purpose.

Held, that there can be a *de facto* corporation only where there is a law under which the corporation might legally be organized.

Farmer, J.

Our statute and the declared public policy of the state have ever prohibited corporations acquiring and holding real estate as an

investment, and it is perfectly clear that that is what is being attempted by appellant.

It is contended that if appellant's charter be held void it is not subject to be attacked collaterally, and that appellee having entered into a contract with appellant for the leasing of the premises, is now estopped to deny its corporate existence. The general rule is, that where there is an attempt in good faith to organize under a law authorizing the incorporation, and corporate functions are exercised, this makes the organization a corporation *de facto*, and its legality cannot be questioned collaterally or by one who deals with it as a corporation. In such cases the introduction in evidence of the charter and proof of user, and that the party seeking to deny the legality of the corporation dealt with it as a corporation, sufficiently proves it a corporation *de facto*, and whether there may have been some irregularities in perfecting the incorporation will not be inquired into. The legality of such incorporation can only be attacked by the state in a direct proceeding.

The appellee concedes that this is the rule as to *de facto* corporations, but contends that there can only be a *de facto* corporation where there is a law under which the corporation might legally be organized, but that if there is no law authorizing the organization of such corporation, its nonexistence or invalidity may be set up collaterally. "The corporation is a *de facto* corporation where there is a law authorizing such a corporation and where the company has made an effort to organize under the law and is transacting business in a corporate name." Where there is a *de facto* corporation, its corporate existence, except in a few exceptional cases, cannot be questioned collaterally, and can only be inquired into by the state and in a direct proceeding. But in order that there should be a *de facto* corporation two things are essential: First, there must be a law under which the corporation might be lawfully created; and second, user. Where the law authorizes a corporation, and there is an attempt, in good faith, to organize, and corporate functions are thereupon exercised, there is a corporation *de facto*, the legal existence of which cannot ordinarily be questioned collaterally. The rule does not go to the extent of precluding strangers from showing that there was no law authorizing a corporation.

The rule that one dealing with a corporation is not estopped to deny its legal existence on the ground that there was no law authorizing it is based on the principle that the law will not recognize nor lend its aid to the organization as a *de facto* corporation where the law does not authorize or where it forbids such corporation. It is analogous to *ultra vires* acts and contracts of the corporation wholly beyond and outside the general scope of its corporate powers and entirely foreign to the objects and purposes of its creation. Such contracts are held void as against public policy and incapable of being validated and enforced by having acted under them.

We are not to be understood as holding appellee is not liable in any event for use and occupation of appellant's premises, for we

are of the opinion if it occupied them under an agreement to pay rent, a liability was created which may be enforced in some appropriate proceeding, but it cannot be enforced in this suit.

9. Effect of Failure to Follow Directory Provisions.

The Butler Paper Co. v. Cleveland. 220 Ill. 128.

The Butler Paper Company sues to recover for merchandise sold the defendants as officers and directors of the C. & C. Company. It seeks to hold them on the ground that the C. & C. Company was defectively organized, in that the meeting of the subscribers for incorporation was not properly called in the manner prescribed by the statute, which further provides that persons purporting to be directors of a corporation not properly organized, shall be personally liable.

Held, that failure to follow a directory provision of a statute will not necessarily prevent a corporation from becoming one *de jure*.

Scott, J.

The sole ground relied upon by the plaintiff as showing a defective incorporation of the C. & C. Company is the fact that the meeting of the subscribers to the capital stock of the company, held for the purpose of electing directors and for the transaction of such other business as might come before them, was not called in the manner pointed out by the statute.

Section 3 of Chapter 32 provides that notice of such meeting shall be given "by depositing in the post-office, properly addressed to each subscriber, at least ten days before the time fixed, a written or printed notice, stating the object, time and place of such meeting."

A decision of this case depends upon the question whether the C. & C. Company is a corporation *de jure*. Proof of a corporation *de facto* does not relieve the directors and officers of the corporation from liability.

The statute prescribes a certain course to be pursued in organizing a corporation in this state. It does not necessarily follow, however, that any departure from that course will prevent a corporation from becoming one *de jure*. Whether or not such departure will have that effect depends upon the nature of the provision which is violated. If it is a mandatory provision, a failure to substantially comply with its terms will prevent the corporation from becoming one *de jure*; but if the provision is merely directory, then a departure therefrom will not have that consequence.

"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business and by a failure to obey

which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute."

The provision of the statute here under consideration, requiring notice of the first meeting to be given to the subscribers to the capital stock of a corporation being organized, by mailing to them notices stating the object, time and place of such meeting, at least ten days before the time fixed for such meeting, is evidently intended only as a direction "given with a view merely to the proper, orderly and prompt conduct" of the commissioners in calling such meeting, and a failure to obey that provision will not prejudice the rights of any persons interested therein if the same result is reached in some other mode. The only persons interested in the result to be attained by giving notice of the object, time and place of a meeting of the subscribers to the capital stock of a corporation for the purposes specified in the statute are the subscribers themselves. We perceive no reason why such persons, where all agree thereto, may not waive the giving of the statutory notice, if the meeting is actually held, as the purpose of the statute in requiring the notices to be given has in such case been accomplished.

Notice of the first meeting of subscribers is not intended for the benefit of the public, as no publicity of such meeting is required, but is merely for the benefit of the subscribers, while the provision requiring the certificate of complete organization issued by the secretary of state to be filed and recorded in the office of the recorder of deeds of the county in which the principal office of the corporation is located [must be complied with], because the provision [is] one for the benefit of the public, and could not be waived.

10. Foreign Corporations.

In re C. B. Comstock & Co. 3 Sawyer (C. C. U. S.) 218.

The Bank of British Columbia filed proof of a debt against the estate of Comstock & Company for payment by the assignee, who objects to the proof on the ground that the Bank is a foreign corporation which has not complied with conditions precedent to the transaction of business within the state.

Held, that a foreign corporation may conduct business within a state only upon compliance with its laws.

Deady, J.

The existence of the foreign corporation styled the Bank of British Columbia is admitted by the assignee. But it is denied that such corporation has the power to transact business in this state, except by its consent, and then only upon the terms of such consent;

and it is claimed that a transaction in violation of such terms is illegal and void for want of power in the corporation.

A foreign corporation has no existence beyond the limits of the sovereignty which created it. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

Yet by the comity of nations the existence of a foreign corporation will be recognized in other countries, and if not prejudicial to their interests or repugnant to their policy it will be permitted to transact business therein. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests.

The corporation, being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. "It must dwell in the place of its creation and cannot migrate to another sovereignty." The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

The bank then has no power to make a contract within this state, without its permission or assent. If the state is silent on the subject, by the comity of nations its permission is presumed, unless it would be contrary to its policy or interest. But the state has spoken on the subject and given its consent to the transaction of business within its jurisdiction by the bank, not absolutely, but upon a condition or a limitation. This condition or limitation is found in the first clause of Sec. 8 of the act, which provides that "a foreign corporation, before transacting business in the state, must duly execute and acknowledge a power of attorney and cause the same to be recorded in the county clerk's office of each county where it has a resident agent."

The state having this right to permit the bank to do business within its limits or not, with or without terms, has seen proper, for the security of its citizens, to require the execution and record of this power of attorney before the transaction of such business. The purpose of this requirement as disclosed in section 9 of the act,

is to thereby secure the appointment of an attorney authorized to receive service of process for the bank, so as to enable the citizens or inhabitants of Oregon who may do business here with it, to sue it in the courts of the state, and thereby avoid the delay and expense, which would often be tantamount to a denial of justice, of following it into the courts of the foreign jurisdiction where it was created.

It follows, of course, from these premises, that the bank had no power to contract in the state until it had complied with the terms upon which the permission to do business was granted. It was required to perform the condition before it transacted business. From the passage of the act of 1864, the assent of the state which was implied by the comity of nations was expressly qualified, so as to be in effect as follows: "The Bank of British Columbia is permitted to transact business in this state, but before doing so it must execute and record a power of attorney," etc.

Whilst it is manifest to the most ordinary observation that it was the intention of the legislature to permit the transaction of business in this state by a foreign corporation only upon the terms provided in the act, yet as it contains no provision imposing a specific penalty for neglect to appoint an attorney as required, or authorizing a proceeding by the state against such corporation for illegal exercise of corporate powers therein, unless the appointment of an attorney is held to be a condition precedent to its right to do business in the state, the act is nugatory.

But it is said that this statute is directory, and therefore the acts of the foreign corporation done in disregard of it are not illegal and void. It is the duty of a court to give effect to the intention of the legislature as far as practicable, and such intention should be ascertained from the words used in the statute and the subject matter to which it relates. The words of this act are certainly mandatory in form. Before transacting any business the corporation must appoint an attorney. Language could not make it plainer. The purpose of the act is apparent. As has been said, it is to secure the people of the state the right to sue the foreign corporation in the courts of the state; but unless the attorney is appointed before the business is transacted, it will not be attained. Lord Mansfield laid down the rule that whether a statute is mandatory or not, depends upon whether the thing directed to be done is the essence of the thing required. Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is required, and without this the statute would be utterly inoperative.

This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this state without first complying with its terms, and as a necessary sequence all acts done in violation of it are illegal and void. The legal effect of the act is the same as if it read: It shall be unlawful for any foreign corporation to transact business in this state before appointing an attorney, etc.

11. Necessity of Legal Existence of Foreign Corporation at Domicile.

The Land Grant Railway & Trust Co. v. The Board of County Commissioners of Coffey County. 6 Kas. 245.

The plaintiff corporation seeks a decree ordering the county commissioners to subscribe to stock of a railway company in accordance with a contract made by the corporation with the commissioners. The commissioners defend on the ground that the corporation was not properly formed in Pennsylvania, its domicile, and can have no legal existence elsewhere.

Held, that a corporation cannot exercise powers as a foreign corporation unless it has a legal existence according to the law of its domicile.

Valentine, J.

A corporation, in order to have any legal or valid existence, must have a home, a domicile, a principal place of doing business, within the boundaries of the state which creates it. It may send agents into other states to do business, but it cannot migrate in a body. If it attempts to migrate in a body, to go beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements, and the persons who comprise it become only individuals. And even where a corporation has a legal and valid existence in its own state, the only recognition that other states will give to it is such as the rules of courtesy and comity between states require.

Under the rules of comity, a foreign corporation may by its agents usually exercise in another state all the powers which it could exercise in its own state, which are not repugnant to the laws and institutions, nor prejudicial to the interests of such other state. And comity would perhaps allow a foreign corporation to exercise in another state, powers beyond what it could exercise in its own state, which were absolutely necessary to the exercise of its legitimate functions in its own state. For instance: Suppose that grapes and wine could not be produced in the State of Pennsylvania; and suppose that the State of Pennsylvania desired to charter a corporation to furnish grapes and wine from the States of New York and California to the people of the State of Pennsylvania. The States of New York and California might, through comity, allow said corporation to hold, occupy, and operate vineyards in their respective states for that purpose. But this is certainly as far as any kind of courtesy or comity would go. No rule of comity will allow one state to spawn corporations, and send them forth into other states to be nurtured, and do business there, when said first mentioned state will not allow them to do business within its own boundaries.

The first section of the plaintiff's charter says that this corporation may do business anywhere except in the State of Pennsylvania—

which is equivalent to saying that it shall not do business in the State of Pennsylvania; and the fourth section says that it shall establish their offices where their business is located, which is equivalent to saying that they shall not establish any office in the State of Pennsylvania. From the only territory in the whole world, over which the State of Pennsylvania has any jurisdiction or control, and in which it could authorize a corporation to have an office, or to do business, it excludes this corporation; and the attempt on the part of the State of Pennsylvania to authorize this corporation to have an office, or to do business anywhere else except in the State of Pennsylvania, is *ultra vires*, illegal and void. The truth is, that while this supposed corporation was originally organized for the whole United States, except the State of Pennsylvania, and afterwards by its amended charter of February 17th, 1870, for the whole world except Pennsylvania, it had no legal or valid existence anywhere upon the face of the earth. At the very creation of this supposed corporation its creator spurned it from the land of its birth, as illegitimate, and unworthy of a home among its kindred, and sent it forth a wanderer on foreign soil. Is the State of Kansas bound by any kind of courtesy, or comity, or friendship, or kindness to Pennsylvania, to treat this corporation better than its creator (the State of Pennsylvania) has done? It can hardly be supposed so, when we come to see how carefully our own constitution has guarded the creation of corporations in our own state.

12. Internal Management of Foreign Corporation.

Madden v. Electric Light Co. 181 Pa. 617.

This was an action brought in Pennsylvania by stockholders against the Electric Light Company, a New Jersey corporation, alleging corporate mismanagement by the directors. As the Electric Light Company had certain franchises in the city of Philadelphia, the complainants contend that the courts of Pennsylvania have jurisdiction to entertain the suit.

Held, that matters relating to the internal management of a foreign corporation must be determined by the courts of its domicile.

Dean, J.

It is argued by appellant that the visible, tangible property of a foreign corporation situated within this state confers local jurisdiction and, therefore, as the conduits are in Philadelphia, our courts have jurisdiction. Without doubt, courts of equity in Pennsylvania have jurisdiction to enjoin unlawful acts by such corporations; to enforce performance of contracts in this state with third parties; in short, have general jurisdiction in equity; but they have no jurisdiction as to their internal management. What constitutes internal management

is well defined: "Where the act complained affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and in case of a foreign corporation our courts will not take jurisdiction."

Here, the plaintiffs, stockholders, accuse the corporate management of disregard of the rights of the whole body of stockholders for whom the corporation is trustee, in making unwise and reckless contracts, which depreciate and render valueless their stock. The wrong complained of is not from the violation of a contract with them, but want of fidelity to duty in their fiduciary relation springing from the nature of the organization.

In substance, the averment is that at the office of the company, in the state of New Jersey, the management, in violation of their official duty, entered into a contract to be performed in Pennsylvania, whereby the stockholders suffer. This plainly strikes at the internal management of the company; the existence of the wrong must be ascertained, and the remedy applied according to the laws of the domicile.

C. Powers of Corporations.

1. In General.

Williams v. Johnson. 208 Mass. 544.

The New York, New Haven & Hartford Railroad Company, the owner of a large tract of land in Boston which had formerly been used for a station, conveyed that land to trustees for the purpose of conducting a business relating to the improvement, sale and management of this and other real estate. In a proceeding to register the title to this land, the defendant stockholders attack the scheme, contending that the corporation had no right to engage in it.

Held, that a corporation has only those rights granted to it by its charter.

Knowlton, C. J.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. When a corporation, created for the purpose of building and operating a railroad, goes into the business of banking, or manufacturing and

selling goods, or dealing and speculating in real estate, because its corporators or board of directors think such adventures may be profitable, or if a bank should go to building and operating a railroad for like reason, it is easy to see that in each instance the corporation is attempting to transact business which, under its organic act, it has no right or power to do. And if the corporation might embark in a separate and distinct business, not contemplated by its charter, merely because it was supposed it would be profitable and increase its means and resources, there would be no safety to the public in granting any special charters, and none to individuals, who might invest in the stock of the company.

If the railroad company had taken its money and purchased land, and had applied it to a use like that contemplated by this scheme, no one would contend that it was acting within the law. We are left with only the question whether its ownership of this real estate justifies its creation of such an enterprise.

Its ownership of the land, which came to it legitimately, left it with the property on hand, to be sold or disposed of, so that its proceeds could be properly used for the purposes for which the corporation was created. It did not give it the right to hold the land permanently, or for an unreasonably long time, as an investment for the production of income; much less did it give it the right to carry on, for a long term of years, the business of speculating in land, or developing this and other land in the vicinity, and changing its general character for the purpose of gain. If the corporation could not do this directly, it could not do it indirectly through the appointment of trustees or agents who should continue the business for its benefit.

The objection to such a venture on the part of a corporation is twofold. On the part of the state it is that the corporation is usurping powers which were never conferred upon it, and is engaging in a business which the legislature has not authorized it to do, and to which there may be grave objections on grounds of public policy.

The other objection is from the side of the stockholder in the corporation. He invests his money by subscribing for the shares of stock, with a knowledge of the purpose for which the corporation is organized, and with a view to the probable gain, and a thought of the possible loss, that may result from the transaction of the business of the corporation.

In turning this real estate into money, the railroad company should not be held too strictly to sales to be made at once and without expenditure for changes and improvements that would increase its marketable qualities. A reasonable latitude in that respect is fairly incidental to ownership with a right to sell. But nothing more than what is fairly incidental to a reasonable disposition of the property for its fair market value, within a reasonable time, is permissible.

The only debatable question in this case is whether such a scheme as has been devised is incidental to the right to sell, and reasonably necessary to enable the corporation to obtain the fair market value of the property. We are of the opinion that it is not.

2. What Purposes are Incidental to Charter.

Bradbury v. The Boston Canoe Club. 153 Mass. 77.

Bradbury sues the Canoe Club, a corporation, upon a promissory note made by it for the purpose of borrowing money with which to build a boat house.

Held, that a corporation may incur liabilities not inconsistent with the objects of its charter.

Holmes, J.

The only question is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club house upon land of which it held a lease.

The defendant is a corporation formed for encouraging athletic exercises. By § 7 "it may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodation, to an amount of not exceeding five hundred thousand dollars," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club house upon it. Having this power, it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of § 7, to receive and hold in trust funds received by gift or bequest, does not confine the corporation to the mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. As this is a sufficient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are not others.

3. Right to Hold Stock in Another Corporation.

The State v. Atlantic City & Shore Railroad Co. 77 N. J. L. 465.

The attorney-general in behalf of the state brings this action against the defendant, alleging certain usurpations of corporate powers not granted by the state, one of which was the acquisition of the bonds and practically all the stock of the Central Passenger Railway Company.

Held, that a corporation may hold stock of another corporation so far as is incidental to the prosecution of its own business.

Pitney, C.

Section 51 of the General Corporation Act reads as follows:

"Any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created

by any other corporation or corporations of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

Reading this section alone, and treating it as unqualified by other legislation, it no doubt conveys the very broad import that is attributed to it in the opinion of the Supreme Court.

It must not be forgotten that stock ownership by one company in another is only a mode by which the former company engages in the business of the latter. Whether the stock ownership be large or small, it amounts in effect to a participation in the business for which the second company is formed. But since the second company (if section 51 were unqualified in its effect) might likewise hold stock in any other corporation or corporations, and these might do the same *ad infinitum*, stock ownership in any company under such a system would not evidence a participation in any definite kind of business, but in effect a participation in a "blind pool," subject to the uncontrolled will of the majority. There would be an end at once of all practical force of the doctrine that a certificate of incorporation evidences a contract between the state and the corporation, or between the incorporators or stockholders themselves. For an agreement imports an obligation to do some things and to refrain from doing other things. Without defining terms and bounds there can be no agreement.

Thus, if the Atlantic City & Shore Railroad Company, upon becoming incorporated for the avowed purpose of constructing and operating a specified line of railroad, and without regard to whether the purchase of stock in other companies is necessary or convenient to the attainment of the objects set forth in its certificates, has the unlimited power to purchase stock and bonds of any other corporation or corporations of this or any other state, it may purchase not only the stock of a traction company in Atlantic City, but the stock of a mining company in Colorado, or may participate in like manner in any conceivable business or speculation in any part of the civilized world. Its articles of association would afford no evidence, either to the law officer of the state or to intending purchasers of its shares, as to the actual scope of its activities; nor would any investor have the slightest assurance that the money he intended to embark in a railroad enterprise in Atlantic county, or the earnings of the capital already embarked, would not be diverted into schemes that he had no means of foreseeing.

Again, it is undoubtedly the general rule in this country that one corporation may not become a stockholder in another unless authority is clearly granted by statute; and this is but a corollary of the principle that corporations possess only such powers as are specifically granted by the state, and such incidental powers as are necessary for carrying these into effect.

To read section 51 of the Corporation Act as conferring upon every company, as a primary power, the capacity of holding stock in other corporations, without the mention of such an object among the declared purposes of the company, and without regard to whether

such stockholding is necessary or appropriate to the objects that are declared, would result in such an overthrow of these established rules and general principles and of the general statutory policy referred to, and would lead to such confusion and such destruction of proper safeguards, that we are constrained to reject that reading in the absence of language imperatively requiring it.

On the other hand, to treat section 51 (as we do) as designed to express and define one of those powers that are referred to in section 2 of the same act, which may be claimed as a primary power when the purpose to exercise it as such is expressed in the certificate of incorporation, and which otherwise may be claimed only as an incidental power, extending so far as may be necessary or convenient to the objects of the company that are expressed in the certificate of incorporation, renders section 51 consistent not only with section 2, but with the general legislative policy of the state respecting corporations.

We incline to think the view we entertain of the proper scope and operation of section 51 is the same that is held by the legal profession in general. The articles of association of what are known as "holding companies" usually, we believe, are made to express in terms the purpose of holding stocks in other corporations. This is true, at least, of notable examples that have come before this court in litigation.

The result is that the Atlantic City & Shore Railroad Company has not the power to purchase or hold stock or bonds in any other company except so far as may be appropriate, necessary or convenient to the attainment of the objects set forth in its certificate of incorporation and its route filed under the provisions of the Railroad Act; that is to say, the construction, maintenance and operation of a line of railway from a point on the meadows in the township of Egg Harbor to a point at the corner of Virginia and Adriatic avenues in Atlantic City. The fact that the street railway lines of the Central company are beyond those *termini* is sufficient, of itself, to show that a control of its securities is beyond the legitimate functions of the Shore Company.

4. Power to Purchase Its Own Stock (Majority Rule).

Atlanta & Walworth Butter & Cheese Association v. Smith.
141 Wis. 377.

The Superior Produce Company was indebted to Smith, one of its stockholders. It transferred most of its property to Smith in exchange for his stock at par, his assumption of certain incumbrances on the property, and his release of the debt. This transaction left the Company insolvent, although Smith did not intend to act in fraud of creditors. The plaintiff, a subsequent creditor of the Superior Produce Company, seeks to enforce payment of a

debt of the Company to it from Smith on the ground that the purchase by the company of its own stock was void.

Held, that a corporation may take its own stock in exchange for property, unless the transaction is fraudulent as to creditors.

Marshall, J.

True, under some circumstances a purchase by a corporation of its own stock would be a fraud on stockholders, and under other circumstances a fraud on present or future creditors, and so void or voidable at the instance of one or more of them in an appropriate judicial proceeding, though the circumstances under which such a transaction may be impeached by future creditors must be quite special. So much so that it is often found stated, generally by text-writers, that, in case a corporation buys in some of its own stock, a subsequent creditor cannot complain.

By a long line of decisions here, in the absence of a plain statutory prohibition to the contrary, and we have none, or such prohibition in the articles of organization of the corporation, a corporation may, in general, so long as it acts in good faith by authorization of its governing body, lawfully purchase its own stock, either as to stockholders or present or future creditors, and without such authorization its officers may, acting in good faith, do so as regards consenting stockholders or such creditors.

While it must be conceded that the common law of England and the judicial rule in a number of states is contrary to the foregoing, it has support in the decisions of many state and federal courts.

The doctrine here stated is said by the federal court to be well settled in the United States.

Many cases cited by text-book writers as following the English rule will be found on examination to be based on the fraudulent nature of the transaction involved, not want of corporate power. Many other cases cited will be found grounded on the general doctrine that all assets of a corporation, whether a going institution or not, constitute a trust fund for creditors, which has no support in this jurisdiction.

In general, where the doctrine heretofore declared, as stated, and now approved, obtains, it is held that, in case an insolvent corporation buys its own stock and the effect of such a purchase is to render it insolvent, the transaction is void as to existing creditors. Such doctrine does not rule in this case, inasmuch as the corporation at the time of the transaction in question was a going concern and it satisfactorily appears that the purpose of the controlling power left in the organization was that it should continue in business as before, indefinitely, and there was no actual intent to defraud.

Counsel for respondent argue that the transaction in question, upon legal principles in general on the subject of remediable fraud upon the rights of creditors, was voidable at respondent's election, and that though there was no actual intent to hinder or delay, effec-

tually or otherwise, existing or future creditors, such was the necessary effect of what occurred, which is equivalent to actual fraud. The court concurs in that view as applied to the facts of this case.

A transaction, as in this case, where, by treaty, the corporation is at once changed from a solvent to an insolvent concern, to the manifest advantage of a stockholder over existing creditors, the parties concerned contemplating that it may and probably will incur other indebtedness, while having the semblance of solvency as before, should be regarded, as to all creditors prejudiced thereby, as characterized by bad faith and so as not having the essential necessary to uphold it under the decisions of this court to which we have referred. In other words, a purchase by a corporation of its own stock, known by the parties to the transaction, or which ought to be known by them, to render it insolvent, is not a purchase in good faith as to existing creditors and not such as to future creditors if the parties to the transaction contemplate that the corporation will continue to do business and incur indebtedness, as before, on the faith of its previously supposed solvency continuing. In such a case the stockholder surrendering his stock is to be regarded as having acted fraudulently, at least constructively, as to existing creditors and subsequent creditors as well, and held, as to the latter, estopped by his conduct from denying his continuance as a stockholder so far as such denial to effect would prejudice such creditors trusting the corporation upon the appearance of solvency, and such continuance is necessary to liability to the corporation for the benefit of creditors or to statutory liability to them.

The duty of a stockholder not to deplete for his advantage corporate assets below the subscribed capital and become a party to a continuance of solvent appearance supplies the need for actual intent to defraud, where the natural and probable effect is to prejudice persons subsequently dealing with the corporation as solvent: condemning the transaction for want of that good faith necessary to sustain a purchase by a corporation of its stock—while at the same time, so far as necessary to fully protect the rights of creditors, the doctrine of estoppel applies to prevent the stockholder from claiming, to effect, that his relations as such holder were terminated by such transaction.

5. Power to Purchase Its Own Stock (Minority Rule).

Morgan v. Lewis. 46 Oh. St. 1.

Morgan sold a furnace property to the Alliance Rolling Mill Company, taking stock in payment. The furnace did not prove as successful as had been hoped, and Morgan took the property back at a time when the company was solvent in exchange for the stock which he had received. Subsequently, the company became indebted to Lewis, who seeks to enforce against Morgan a statutory liability of a stockholder for the debts of the company,

contending that the purchase by the corporation of its own stock was void as against creditors.

Held, that according to the minority rule, a corporation may not traffic in its own stock, yet it may receive its own stock as security for a debt and for other similar purposes.

*Owen, C. J.*¹

We have no disposition to call in question the general and well recognized principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon a want of power, rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due it, has long been recognized in this state.

This has been recognized as an exception supposed to rest upon the necessity of avoiding loss. It is, nevertheless, a relaxation of the general rule. It is, of course, because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt, that the exception is recognized. If the same or a like necessity of avoiding loss should arise in any of the transactions of the company, it could not, with any show of reason, be contended that the application of this principle of necessity should be limited by any iron rule to the case of taking stock for an otherwise hopeless debt.

An executory agreement between a manufacturing corporation of this state and one of its stockholders, for the purchase of the stock of such corporation, by the former from the latter, can not be enforced, either by action for specific performance or for damages. [But] no inflexible rule has been recognized by this court, that a corporation may not in any case, nor for any purpose, receive its own stock. On the contrary, the way is left open for the application of exceptions to the general rule in proper cases. It is one of the established facts in the case that all the debts which are sought to be satisfied by this proceeding were contracted subsequently to the transaction which is assailed. The transfer of the furnace property from the possession of the company to that of Morgan was a fact to which persons giving credit to the company could not safely close their eyes. The inquiry which it would naturally excite would have led to the information that the trade by which the company secured the furnace, and Morgan the stock, had simply been rescinded and the property—stock and furnace—re-exchanged. It being the law of our state that there are exceptions to the general rule that corporations may not deal in their own stock, all persons dealing with this company must be held to have done so in the light of this state of the law. All persons are as much presumed to know of exceptions to a principle as of the principle itself. The slightest inquiry would have revealed the fact that, as between himself and the company, Morgan did not sustain the relation of stockholder at the time these debts were contracted.

6. Right of Corporation to Hold Real Estate.

Nicoll v. The New York & Erie Railroad Co. 12 N. Y. 121.

Dederer conveyed to the Hudson & Delaware Railroad Company certain real estate which it in turn conveyed to the New York & Erie Railroad Company. The plaintiff, Nicoll, became the owner of the remainder of the land owned by Dederer and insists that the land in suit is included in his grant for the reason that a corporation cannot hold real estate.

Held, that a corporation may hold real estate unless forbidden by its charter or by statute.

Parker, J.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute. And in this case the power was expressly conferred by the 9th section of the charter; and by the 16th section there were given to it the general powers conferred upon corporations, one of which is that of holding, purchasing and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant.

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years, therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held, that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because, in his earthly existence, he is not immortal. Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

7. Effect of Conveyance of Real Estate to Corporation.

Kerfoot v. Farmers' & Merchants' Bank. 218 U. S. 281.

The heirs of Kerfoot seek to set aside a conveyance of real estate by Kerfoot to the First National Bank of Trenton, Mo.,

made in pursuance of an arrangement by which title to the property was to be held in trust by the Bank, subject to directions of the grantor. The basis of this action is the rule that a national bank is not ordinarily authorized to hold real estate.

Held, that the effect of a conveyance to a corporation not entitled to hold real estate is to make the title voidable, not void.

Hughes, J.

While the purpose of this transaction was not one of those described in the statute for which a national bank may purchase and hold real estate, it does not follow that the deed was a nullity and that it failed to convey title to the property.

In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter, is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. Thus, although the statute by clear implication forbids a national bank from making a loan upon real estate, the security is not void and it cannot be successfully assailed by the debtor or by subsequent mortgagees because the bank was without authority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the bank open to proceedings by the Government for exercising powers not conferred by law.

This rule, while recognizing the authority of the Government to which the corporation is amenable, has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result. In the present case a trust was declared and this trust should not be permitted to fail and the property to be diverted from those for whom it was intended, by treating the conveyance to the bank as a nullity, in the absence of a clear statement of legislative intent that it should be so regarded.

8. Ultra Vires Contract of Which Corporation Has Benefit.

Denver Fire Insurance Co. v. McClelland. 9 Col. 11.

McClelland insured his crops with the Fire Insurance Company against damage by hail. The crops were injured by the peril insured against, and McClelland seeks to recover the amount of the insurance. The defendant contends that the granting of hail insurance is not within the scope of its charter and that it is accordingly not liable.

Held, that a corporation is bound by contracts beyond the scope of its authority of which it has had the benefit.

Stone, J.

It is quite well settled, as a general rule, that a corporation pos-

sesses only such lawful powers as are expressly conferred by its charter, and such as are clearly incidental or impliedly requisite for carrying out the declared objects and purposes of its creation.

On the one hand, it is held by some authorities that acts of a corporation in excess of the powers limited by the foregoing rule are illegal, that any contract made in such excess of lawful authority is void and not enforceable, and that neither party to an action founded thereon is estopped to plead the *ultra vires* of the contract in bar of such action.

On the other hand, it has come to be the settled doctrine of several states that a corporation may be estopped to deny its authority to enter into a contract which has been executed, and from which it has derived the benefit which it thereby sought. There seems to be a growing tendency to this doctrine in modern decisions in this country and it is also supported by the authority of English cases.

[It is said that] it is now settled that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. So if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was affected by it. He had paid a small portion of money on the amount of the premium agreed to be paid and had given a promissory note for the balance. This was all he agreed to do; or that had been exacted of him by the insurance company, and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

The plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons. Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action rises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us.

We are aware that the courts have been very slow to concede that a defendant setting up as a defense the *ultra vires* of a contract,

where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts could avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

9. Ultra Vires Contract of Which Other Party Has Benefit.

The Bath Gas Light Co. v. Claffy. 151 N. Y. 24.

The Bath Gas Light Company, the plaintiff, leased to the United Gas, Fuel & Light Company all its property and franchises for a term of twenty five years. The Fuel & Light Company executed a bond conditioned upon the faithful performance of the terms of the lease. After a default in a payment due, the plaintiff reentered and sues on the bond for the rent due and unpaid. Claffy, one of the sureties, defends on the ground of *ultra vires*.

Held, that by the general rule a corporation may recover on an *ultra vires* contract against a person receiving the benefit of that contract.

Andrews, C. J.

The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others. This doctrine is embodied in the Revised Statutes of New York, and the section relating to the subject is regarded as simply declaratory of the antecedent law. It has been frequently stated that the validity of contracts of corporations is to be determined by comparing the contract made with the charter, and if upon such comparison it appears that the contract was neither expressly authorized, nor a necessary or reasonable incident to the exercise of the powers specifically granted, the contract is *ultra vires*. It seems that by the ancient common law a corporation could bind itself by a contract under its corporate seal, although the contract was not within the powers specified in the charter, and even although it contained negative words.

The modern and reasonable doctrine that contracts into which corporations may lawfully enter are such only as are expressly or impliedly authorized by their charters, is nevertheless frequently disregarded in practice, and when this is done and a corporation enters into a contract beyond its chartered powers, the question arises which

has been the subject of debate and of much difference of opinion, how shall such a contract be treated by the courts, and whether the contract can create any rights as between the parties which the courts will enforce. There are some propositions pertaining to the general subject which are beyond dispute. One is, that a contract by a corporation to do an immoral thing, or for any immoral purpose, or, to use a convenient expression, a contract *malum in se*, is void and gives no right of action. The doctrine, however, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed.

But in not infrequent instances corporations enter into unauthorized contracts, which are neither *mala in se* nor *mala prohibita*, or when the only prohibition or restriction is implied from the grant of specified powers. It is this class of cases which open the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances or enforce its obligation, whether as to past or future transactions? There are certain English cases which are relied upon by those who maintain the strict view that contracts of corporations *ultra vires* are under no circumstances enforceable in the courts.

The Supreme Court of the United States seems to be committed to a construction of the doctrine of *ultra vires* which would sustain the defense in the case now before us.

There are obvious reasons of propriety and public policy, the prevention of monopolies, among others, aside from the mere question of capacity under their charters, which enforce the now well settled doctrine that leases by such quasi-public corporations, to be valid and effectual, must be authorized by statute. But where, as in the present case, such an unauthorized lease has been made, and the lessee has received and enjoyed the possession of the property under the lease, is there any public policy which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay the rent reserved during the enjoyment of the property?

The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that it did not, during its occupation, discharge all the obligations

to the public which rested upon the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust. It has been suggested, to avoid the apparent injustice which would result from holding that there could be no recovery on the contract for past-due rent, that there might be a remedy on an implied contract to pay the value of the use of the property. But if the express contract was illegal in a proper sense, and the parties to the lease were guilty of a public wrong, so as to preclude a court of equity to entertain jurisdiction on the application of a lessor to be relieved from the lease and to be restored to the possession of the leased property, then surely it would be a mere evasion and would be inconsistent with legal principles for the court to imply a contract from the occupation under the illegal lease to relieve the wrongdoer from the dilemma into which he had voluntarily placed himself. We think the rule which should be applied is that the lessee is bound by the contract so long as he remains in possession.

The courts in this state from an early day have sought to regulate and restrict the defense of *ultra vires* so as to make it consistent with the obligations of justice.

10. Ultra Vires: United States Rule.

Central Transportation Co. v. Pullman's Palace Car Co. 139 U. S. 24.

The Central Transportation Company leased all its personal property to the Pullman's Palace Car Company under an indenture whereby the Pullman's Palace Car Company agreed to pay a certain annual rental. Both companies were engaged in the business of manufacturing railway cars. The charter of the plaintiff Transportation Company was not drawn in such a way as to authorize the transfer of the assets which was made. The Pullman's Palace Car Company took possession of the Transportation Company's cars and retained them for several years, operating under the provisions of the contract. It then canceled the contract in accord-

ance with a provision therein contained; and the plaintiff sues to recover rent due.

Held, that according to the United States rule, any *ultra vires* contract is void.

Gray, J..

The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also *ultra vires* of the defendant, because, in order to bind either party, it must be within the corporate powers of both.

It was argued in behalf of the plaintiff, that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period.

But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court.

A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side

can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

The rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it"; and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands."

Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit* or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for.

11. Effect of Ultra Vires Contract: United States Rule.

St. Louis etc. Railroad Co. v. Terre Haute etc. Railroad Co.,
145 U. S. 393.

The St. Louis Railroad Company seeks to cancel a conveyance of its railroad and franchises to the defendant for a period of 999 years. After the lease had been in effect for some 17 years, it

contends that this conveyance was beyond the authority of its own charter and of the charter of the defendant road.

Held, that equity will not interfere to cancel an *ultra vires* contract which is no longer executory.

Gray, J.

The general rule, in equity, as at law, is, *in pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. Consequently, it is well settled at the present day that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and canceled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee that the conveyance cannot be considered the voluntary act of the grantor.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The

invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration, from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him, and had no right to retain.

12. Liability of Corporation for Torts.

Goodspeed v. The East Haddam Bank, 22 Conn. 530.

Goodspeed sues the Bank for instituting a vexatious suit charging him with an attempt to defraud the Bank. The corporation contends that it is not responsible for intentional torts.

Held, that a corporation is liable for its torts.

Church, C. J.

It was said by Lord Coke, "that corporations had neither souls nor bodies"; and by somebody else, "that they had no moral sense"; and from thence, or for some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs, nor be liable for torts, with a few exceptions, as we shall see.

The views of the old lawyers regarding the real nature, power, and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures for malfeasance, and even to the loss of corporate life by the revocation of their charters. And now it seems to be generally admitted that they are civilly responsible, in their corporate capacities,

for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. And indeed, no actions are now more frequent in our courts than such as are brought against corporations for torts, either in case or trespass. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. And it was decided long ago that a corporation was liable to an action for a false return to a writ of *mandamus*, alleged to have been made falsely and maliciously.

The objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort, which essentially consists in motive and intention. The claim is that, as a corporation is ideal only, it cannot act from malice, and therefore cannot commence and prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one—they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank, in the usual modes of its action; and still to claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

The interests of the community and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shall exempt them from the ordinary liabilities of natural persons for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection for all their rights and privileges, and no more.

13. Liability for Tort in Ultra Vires Transaction.

Nims v. Mount Hermon Boys' School. 160 Mass. 177.

Nims was injured through the negligence of a ferryman employed by the defendant, an educational corporation which allowed the public to use its ferry for hire. The corporation contends that it is not liable for its *ultra vires* torts.

Held, that a corporation is liable for torts committed in an *ultra vires* undertaking.

Knowlton, J.

It is a general rule that corporations are liable for their torts as natural persons are. It is no defense to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business. If a corporation by its officers or agents unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferry-boat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it either expressly or by implication, is invalid considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work. On the other hand, courts have frequently held that, while such contracts considered merely as contracts are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one, who, after entering into such a contract and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail, when to allow it would work injustice and accomplish legal wrong. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them and leave the other party without remedy, as he might do in a supposable case, where another had put himself at a disadvantage on the faith of a contract with him to commit a crime. In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or

agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires*, but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry-boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee; it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

14. Criminal Liability.

United States v. John Kelso Co. 86 Fed. 304.

The defendant corporation is charged with criminal violation of an act relating to hours of labor of persons employed upon certain public works. The corporation defends in part on the ground that it is incapable of entertaining a criminal intent.

Held, that a corporation may be criminally liable for acts done by it.

De Haven, Dis. J.

It will be observed that by the express language of this statute there must be an intentional violation of its provisions, in order to constitute the offense which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. [There is authority to the effect that] a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act. In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act

should be done is imputed to the corporation itself. That a corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element is not disputed this day. Thus an action for malicious prosecution will lie against a banking corporation. An action will lie also against a corporation for a malicious libel.

The directors are the chosen representatives of the corporation, and constitute to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do an injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case.

15. Statutory Enumeration of Powers of Corporations.

Massachusetts Acts and Resolves of 1903. Chapter 437.

Section 4. Every corporation which is subject to the provisions of this act shall have the following powers and privileges and shall be subject to the following liabilities:—

(a) To have perpetual succession in its corporate name, unless a period for its duration is limited by special law.

(b) To sue or be sued in its corporate name, and to prosecute or defend to final judgment and execution or decree in any court of law or equity.

(c) To have a capital stock to such an amount as may be fixed in its agreement of association or articles of organization or of amendment as hereinafter provided.

(d) To have a corporate seal, which it may alter at pleasure.

(e) To elect all necessary officers, fix their compensation and define their duties.

(f) To hold, purchase, convey, mortgage or lease within or without this commonwealth such real or personal property as the purposes of the corporation may require.

(g) To make contracts, incur liabilities and borrow money on its credit and for its use.

(h) To make by-laws not inconsistent with the laws of this commonwealth for regulating its government and for the administration of its affairs as hereinafter provided.

(i) To be dissolved or to have its affairs wound up in the manner hereinafter provided.

II.

MEMBERSHIP IN CORPORATIONS.

In non-stock corporations, the matter of membership is regulated by charter, or by the by-laws when the charter is silent. Usually, the charter or act under which such a corporation is formed provides for the original membership necessary to constitute the corporation, and new members are taken in, after the corporation has come into existence, under rules prescribed by the charter or by-laws.

Membership in stock corporations is determined by the ownership of shares of stock. Ownership of shares is acquired by contract with the corporation. This may be by a contract of subscription either before or after organization, by the purchase of shares from the corporation after organization, or by the purchase and transfer of shares from one who owns them. In the latter case, there is a novation of the contract of membership. The transferee is substituted by the implied or express consent of the corporation to all the rights and privileges of the transferor, and generally assumes his liabilities. As against the corporation, a transfer of stock is effective only when the corporation recognizes it. Reasonable restrictions on the transfer of capital stock may be indicated by the by-laws but the right of members to make transfers under reasonable conditions may not be abrogated.

The capital stock of a corporation is the amount in money or property subscribed and paid in, or secured to be paid in, by the shareholders, and always remains the same unless changed by legislative authority. The capital of a corporation includes all the property of the corporation, and may therefore be greater or less in value than the capital stock.

The ownership of shares of the capital stock gives the stockholder the right to his proportionate share of the surplus of the corporation which is distributed in dividends, and, on the dissolution of the corporation, to so much of the assets as is available for distribution after creditors have been satisfied. Such a share gives no title to the assets of the corporation, nor does it in any way make the owner an agent of the corporation.

In the absence of statute, a stockholder is not liable for debts of the corporation. Usually a limited liability is created, such as that to employees within a specified time after demand for wages, but upon full paid stock there is no liability otherwise arising from the nature of the stockholder's ownership. This freedom from liability does not exist until such time as the stock is fully paid for, and does not apply to stock issued without ade-

quate consideration. Until stock is fully paid for, the corporation or creditors may bring action to recover the full amount due from stockholders.

Formerly, the transfer of stock operated only as an assignment, giving the assignee the rights of his assignor. At the present time, by the Uniform Stock Transfer Act, in effect in most jurisdictions, the delivery of stock by the person named as the stockholder in the certificate, or by a person entrusted by him with its possession for any purpose, to a purchaser for value, with a written transfer thereof, signed by the person named as the stockholder in the certificate, is a sufficient delivery to transfer title as against all persons; but no such transfer affects the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until it has been recorded upon the books of the corporation, or until a new certificate has been issued to the person to whom it has been so transferred. Such a purchaser, upon delivery of the former certificate to the treasurer of the corporation, may receive a new certificate.

Stockholders have a right to examine corporation records for proper purposes connected with their membership in the corporation. At common law this right is not absolute but depends upon the propriety of the motive actuating the stockholder in making his request for an inspection of the books. By statute in many jurisdictions this right becomes absolute.

By reason of the fact that the corporation is a legal person distinct from the stockholders, they may contract with it as with any other person. As stockholders, they do not stand in a fiduciary relationship to the corporation, although this relationship of trust may arise from their intimate connection with it as officers or agents. In the absence of something in addition to the mere fact of owning stock, stockholders and the corporation may deal with each other at arms' length.

By becoming a member of the corporation, each stockholder impliedly agrees that the will of the majority shall govern in all matters coming within their power, provided only that they act in good faith. As long as the interests of the corporation are served, a minority stockholder cannot interfere with the conduct of the business by the majority or by officers elected by that majority. When, however, the majority go beyond the purposes of the corporation as set forth in the charter, a minority stockholder who does not assent may require that the business be confined to its authorized scope.

A. Nature of Stock and Ownership Thereof.

1. Capital Stock.

The People ex rel. The Union Trust Co. v. Coleman. 126' N. Y. 433.

The Union Trust Company brings this action against the defendants, commissioners of taxes, to determine the propriety of taxation upon the actual value of its capital stock. The assessors have taken as actual value the market value of the shares of the Trust Company, which contends that the true purpose of the statute is to tax the value of its property.

Held, that the capital stock of a company is to be distinguished from capital stock held in shares by the corporators.

Finch, J.

Now, it is certain that the two things are neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition. So that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock

covers, embraces, represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities. A company also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. And thus the two things—the company's capital stock and the shareholder's capital stock—are essentially and in every material respect different. They differ in their character, in their elements, in their ownership and in their values.

There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety.

I think the authorities either fairly permit or fully justify the conclusions which I reach and which may be stated with reasonable accuracy thus: First, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus. Second, such capital and surplus must be assessed at its own value, and when that is correctly known and ascertained, no other value can be substituted for it. Third, where its amount and value are undisclosed and unknown, the assessors may consider the market value of the share stock and the general condition of the company as indicative of surplus or deficiency and of the probable amount of either. Fourth, they may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof.

If these conclusions are correct it will follow that the assessment complained of should be canceled.

2. Capital and Capital Stock.

Person & Riegel Co. v. Lipps. 219 Pa. 99.

The plaintiff, a New Jersey corporation, sues Lipps upon an agreement made by him to invest certain money in a reorganization of the corporation proposed by him. He defends in part upon the ground that the corporation was not properly organized and did not have capacity to carry out its contract, for the reason that the preferred stock, part of which he had agreed to buy, was an over-issue, as it represented more than two-thirds of the nominal capitalization, and was consequently illegal and *ultra vires*.

Held, that the legality of an issue of preferred stock under the former New Jersey statute is to be determined in reference to capital actually invested, not in reference to the nominal capital.

Brown, J.

The appellee is a corporation organized under the statutes of New Jersey, and by an act in that state, in force in November, 1900, at the time the appellant is alleged to have broken his contract, it is provided that "every corporation shall have power to create two or more kinds of stock of such classes, with such designations, preferences and voting powers, or restrictions or qualifications thereof as shall be stated and expressed in the certificate of incorporation; and the power to increase or decrease the stock, as in this act elsewhere provided, shall apply to all or any of the classes of stock; but at no time shall the total amount of preferred stocks exceed two-thirds of the actual capital paid in cash or property." It is to be noted that this act does not provide that the total amount of the preferred stock shall not exceed two-thirds of the capital stock, but of the "capital paid in cash or property." As amended in 1901, the act does contain a provision that preferred stock shall not exceed two-thirds "of the capital stock paid for in cash or property." It is evident, from a comparison of the original act with its amendment, that the legislature regarded the difference between the capital and capital stock of a corporation; and there is a well understood distinction, universally recognized, between "the capital or property" of incorporated companies and "their capital stock." The term "capital" applied to corporations is often used interchangeably with "capital stock," and both are frequently used to express the same thing—the property and assets of the corporation—but this is improper. The capital stock of a corporation is the amount subscribed and paid in by the shareholders, or secured to be paid in, and upon which it is to conduct its operations; and the amount of the capital stock remains the same, notwithstanding the gains or losses of the corporation. The term "capital," however, properly means not the capital stock in this sense but the actual property or estate of the corporation, whether in money or property. As was said in a New York case, "It is the aggregate of the sums subscribed and paid in, or secured to be paid in by the shareholders, with the addition of all gains or profits realized in the use and investment of these sums, or if losses have been incurred, then it is the residue after deducting such losses." It follows that a corporation's capital may be many times greater than its capital stock, and it is this which makes the shares of stock of a corporation worth more on the market than their par value. There is a distinction between the capital of a corporation and its capital stock, though they are often used as interchangeable terms. The capital stock is clearly not the same as property possessed by the corporation; for the capital stock remains fixed although the actual property of the corporation varies in value, and is constantly increasing or diminishing in amount. What the amount of the capital shall be is within the discretion of the managers, but the amount of the capital stock is limited and determined by the charter and the law governing it. It follows, therefore, that a limit imposed upon the capital stock

of a corporation does not restrict the amount of property which it may own.

3. Right to Membership in Stock Corporation.

National Bank v. Watson town Bank. 105 U. S. 217.

The Cecil National Bank brings a bill in equity to compel the Watson town Bank to issue to it a certificate for 200 shares of the capital stock of the latter. The stock in the Watson town Bank had been acquired by the Cecil Bank as collateral security for a loan to Powell & Company, who failed at a time when Powell & Company were indebted to the Watson town Bank, which claimed a lien upon the stock until the indebtedness should be paid. Nevertheless, the cashier of the Watson town Bank accepted the stock certificate, agreed to forward a new one, and made corresponding entries in the stock ledger. The question is whether by this transaction, Tome, the president of the Cecil Bank, and acting for it, became a stockholder in the Watson town Bank and so entitled to a stock certificate.

Held, that a transfer of stock duly recognized by a corporation constitutes the transferee a stockholder.

Matthews, J.

A complete transfer of the title to the stock upon the books of the bank, it is not doubted, would have the effect to vest it in the transferee, free from any claim or lien of the bank. The consent of the bank, made necessary to such transfer, is the waiver of its right, as its refusal would be the assertion of it. The transfer, when thus consummated, destroys the relation of membership between the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations. This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it. All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable, and fully meets the requirements of law. Accordingly, when the cashier of that Watson town Bank received from Tome the certificate, with the authority for its transfer to him duly executed by Powell & Co., and, in pursuance of the request to make the transfer, charged it in the account against the former owner, and gave to Tome the correspond-

ing credit, the latter became a stockholder in the bank, invested with the legal title to the stock, and with all the rights, powers, and privileges belonging to that character. Nothing more remained to be done to make the conveyance of title complete and absolute, and, so far as the bank was concerned, it was irrevocable. It had consented to the transfer, and the transfer had been made. Thenceforward the rights of Tome in respect to the stock in question were all they could have been if it had belonged to him by virtue of an original subscription. The claim of the bank upon it, based upon the existing relation with the former owner, ceased when, with its consent and through its act, that relation ceased.

4. Right to Membership in Non-Stock Corporation.

The American Live Stock Commission Co. v. The Chicago Live Stock Exchange. 143 Ill. 210.

The American Live Stock Commission Company seeks a decree entitling it to membership in the Chicago Live Stock Exchange, a private non-stock corporation. It bases its claim upon a certificate of membership assigned to it by Rogers, formerly its manager. It contends that the possession of this certificate gives it the right to membership.

Held, that a non-stock corporation may make such rules for admission of members as it sees fit.

Bailey, C. J.

The Exchange is a corporation having rules or by-laws determining the qualifications for membership, and prescribing the mode in which members may be admitted, and there is no pretense that the complainant has ever brought itself within the terms of said rules or by-laws, so as to be entitled to membership.

Said association had an undoubted right to adopt this rule, and as it prescribes the mode and the only mode in which membership in the Exchange can be obtained, no one can justly claim to be a member who has not been admitted in the mode thus prescribed.

It may also be noticed, in immediate connection with the point now under consideration, that a court of chancery has no power to order the Exchange to issue the certificate of membership formerly held by Rogers to the complainant or its general manager, so as to constitute it or him a member. Before an applicant can become a member, his application must, among other things, be indorsed by two members and must receive the approval of at least seven members of the board of directors, voting by ballot. Members and directors of such corporations, in acting upon applications for membership, are necessarily entitled to a freedom which is not subject to judicial compulsion. No two members can be compelled to indorse an application, nor can any seven members of the board of directors be com-

pelled to vote in its favor, but both are entitled to act upon their own judgment and according to their own choice. In other words, a court of chancery will not undertake to force upon a corporation of this character, a member, against the will of those whose duty it is to pass upon applications for membership.

5. Restriction of Transfer of Shares.

Miller v. Farmers' Milling & Elevator Co. 78 Neb. 441.

The Farmers Milling & Elevator Company adopted a by-law to the effect that no person should be allowed to hold more than 5 shares of its stock at one time. Miller bought 64 shares of the stock, which the directors refused to transfer to him. Miller brings this action to enforce his rights as a stockholder.

Held, that an unreasonable restraint upon the transferability of shares of a corporation is void.

Albert, C.

The power to make by-laws not inconsistent with the law of the land, is one of the common law incidents to a corporate existence, and is expressly conferred by statute. The transfer of stock has been uniformly regarded as a legitimate subject of corporate legislation, to enable the company to know who are stockholders, to whom dividends are to be paid, who are entitled to vote, and, where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its own rights. But such legislation will not be enforced beyond what is necessary to serve those purposes, where its enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint upon the disposition of property in the stock of the corporation. The right of transfer is incidental to the ownership of shares in the stock of joint-stock companies and corporations, formed in pursuance of legislative authority; and a by-law which unreasonably interferes with the free exercise of this right is void, as being in restraint of trade.

A charter provision or by-law which restricts [a stockholder's] right of transfer to a transfer of his actual, instead of his nominal, interest in the corporation is radically different in principle from a provision limiting the number of shares a person may hold or which forbids a transfer without the consent of the corporation.

6. Nature of Stock Certificates.

East Birmingham Land Co. v. Dennis. 85 Ala. 565.

Dennis brings a bill against the Land Company to compel it to transfer to him on its books ten shares of its stock. The cer-

tificate under which Dennis claims was issued in the name of Dearborn and indorsed by him to a holder who sold it to Dennis. This certificate was subsequently lost or stolen. Mudd claims title to the certificate through purchase from a firm of stockbrokers.

Held, that in the absence of statute, a stock certificate is not negotiable.

Somerville, J.

Whether Mudd's title to the stock is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper.

The rule is well settled that a bona fide purchaser of a negotiable bill, bond or note, although he buys from a thief, acquires a good title, if he pays value for it without notice of the infirmity of his vendor's title. The authorities are clear in support of the view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority to make the sale. This question arose and was decided by the New York Court of Appeals, which held that such a certificate does not partake of the character of a negotiable instrument, and that a bona fide assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be, in some respects, like a bill of lading, or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is that all such instruments possess a sort of *quasi* negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

No commercial usage could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power, as agent or trustee, to deal with such stock to a limited extent and transfers it by exceeding his powers, or in breach of his trust. In such cases, it has often been held that the true owner, having conferred on the holder, by contract, all the

external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver, than a stranger who has been negligent in trusting no one.

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stockbrokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract.

7. Effect of Statute Upon Transferability of Stock Certificate.

Clews v. Friedman. 182 Mass. 555.

The plaintiffs, bankers in the city of New York, bought stock belonging to Mrs. Zunz on March 1, taking a written transfer signed by her on the back of the certificate. On March 3, they presented the certificate to the corporation for transfer to them and found that it had been attached by Friedman on February 20. They seek to restrain Friedman from enforcing the attachment.

Held, that under the Uniform Stock Transfer Act, a stock certificate is transferable by delivery.

Knowlton, C. J.

This case calls for a construction of the St. 1884, c. 229, which is as follows: "The delivery of a stock certificate of a corporation to a bona fide purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the persons to whom it has been so transferred." This enactment was a new departure and a change of policy in the legislation of this commonwealth.

In 1884 purchasers and pledgees sought to obtain greater security and convenience, and the result was the statute now before us. By the language of the act "Delivery of a stock certificate . . . with a written transfer . . . signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties." Here the certificate is treated as evidence of a title. The assignment is to

be made by the owner of the certificate, and the transfer of the certificate transfers the title. What is meant by title? Evidently the title to the stock. A certificate in common form purports to represent a perfect title to the stock. The transfer of the certificate, by virtue of the statute, transfers the title referred to as against all parties, including attaching creditors. The statute declares in effect that an attachment shall be of no avail against a bona fide transaction of this kind.

8. Effect of Transfer of Stock.

Russell v. Easterbrook. 71 Conn. 50.

The receiver of the Connecticut Pipe and Manufacturing Company, an insolvent corporation, seeks to recover from Easterbrook, a shareholder of record, the balance due on shares of stock which had not been fully paid in. Phipps, the president of the Company, had transferred the stock on the books of the Company to Easterbrook in pursuance of an agreement whereby the stock should become the property of Easterbrook if he continued in the employ of the Company. Easterbrook terminated his employment with the Company and notified Phipps and the secretary of the Company that the stock should be reassigned to Phipps. The secretary, under the direction of Phipps, refused to transfer the stock to Phipps, although the transfer was properly made out.

Held, that a corporation is not affected by a transfer of its stock until the transfer is made on its books.

Baldwin, J.

It is a matter of great public importance that the stock books of business corporations should at all times show who are their shareholders. Each one of these is a participant in a franchise granted by the state. He must be either one of the original grantees, or among their associates or successors. The mode of succession is particularly prescribed by law. When not otherwise provided by the charter, stock can be transferred only on the books of the corporation. Whatever equitable rights may be derived from a sale of shares, accompanied by a delivery of the stock certificate with a power of attorney for their transfer, until that transfer is actually made, the legal title, and legal rights and liabilities of the stockholder of record, remain unchanged. The defendant, upon accepting from Phipps a transfer of the shares in question, became bound to pay the Connecticut Pipe Manufacturing Company, when properly required by its directors, whatever remained unpaid upon them under the terms of Phipps' subscription. The company could have enforced this obligation, had its directors made a call, even if it had notice that Phipps was the equitable owner of the stock as between him and the defendant. With their mutual contracts and equities it had no concern. The same right passed to its receiver.

The defendant claims the benefit of the exception to the general rule that those and those only are stockholders who appear as such upon the stock-books of the corporation, which has sometimes been recognized in cases where the parties have done everything to entitle them to a transfer, but the recording officer has wrongfully refused to make or permit the entry. Under such circumstances, the corporation ought not to profit by its own violation of legal duty. But, here, the stock had never been delivered as between the parties, and the secretary (even were it to be assumed that the company knew all that its president and general manager knew) was in no fault in declining to permit a transfer upon its books to one who had notified him that he refused to consent to it.

9. Effect of Transfer of Stock.

Visalia & Tulare Railroad Co. v. Hyde. 110 Cal. 632.

The Railroad Company sues to recover from Hyde an assessment on stock originally subscribed for by Creighton, and transferred by him to Hyde, who registered the transfer upon the books of the corporation. Hyde defends on the ground that prior to the action brought against him he had transferred his stock to a third party.

Held, that a corporation may enforce liabilities against stockholders of record regardless of the real ownership of the shares.

Harrison, J.

By purchasing the stock from Creighton, and causing a transfer thereof to himself to be entered upon the books of the plaintiff, the defendant was substituted for Creighton as a stockholder of the corporation, and thereafter held the shares on the same conditions, and subject to the same obligations, as did Creighton prior to the transfer. The very essence of a corporation consists in corporate succession, which, in stock companies, is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under different relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. It seems to be an unavoidable conclusion that every liability which attaches to a stockholder, as such, is inseparable from the ownership of the stock. The reasons for subjecting the original subscribers to personal liability apply with equal force to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is created.

The defendant did not divest himself of this liability by an assignment of the certificate to another subsequent to the levy of the assessment, especially as his assignee did not procure a transfer to himself upon the books of the corporation. For the purpose of ascertaining those who are liable to it for the amount of the assessment,

the corporation can look only to the list of stockholders as their names are registered upon its books.

10. Right of Subscriber to Withdraw.

Bryant's Pond Steam Mill Co. v. Felt. 87 Me. 234.

Felt subscribed to the capital stock of the Mill Company when it was about to be organized. Before organization, he revoked the subscription and notified the promoters that he would not accept his stock. This action is to enforce the subscription.

Held, that until the organization of a corporation, a subscriber to its stock may withdraw.

Walton, J.

The question is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two parties to make a contract. A nonexistent corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. It is a mere *nudum pactum*,—a promise without a promisee,—a contract without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is effected, and his promise has been accepted, then we have all the elements of a valid contract. Competent parties. Mutuality of duties and obligations. A valid consideration, the promise of one party being a sufficient consideration for the promise of the other. A promisee as well as a promisor. A contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting, and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted, it becomes binding. Till accepted, it remains revocable. This conclusion is sustained by reason and authority.

It is urged that such subscriptions create binding and enforceable contracts between the subscribers themselves, and are therefore irrevocable, except with the consent of all the subscribers. Reason and the weight of authority are opposed to such a view. Subscription papers may be so worded as to create binding contracts between the subscribers. But we are not now speaking of such subscriptions, or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding; we are now speaking only of subscriptions to the capital stock of proposed business corporations.

II. For What Stock May be Issued (By Statute).

Massachusetts Acts and Resolves of 1903. Chapter 437.

Section 14. Capital stock may be issued for cash, property, tangible or intangible, services or expenses. Stock which is issued for cash may be paid for in full before it is issued or by instalments. If it is paid for by instalments, the stock certificate shall be legibly stamped with the words ". . . per cent. paid up, balance payable (stating manner and time of payment) . . . and shares subject to forfeiture if unpaid," the proportion and terms of payment being stated to agree with the facts; and, as each instalment is demanded and paid, the certificate shall be stamped accordingly. Stock may be issued subsequent to the issue of stock certified by the articles of organization if a certificate is prepared within thirty days after the date when the issue of such additional stock has been authorized, and is signed and sworn to by the president, treasurer and a majority of the directors setting forth: (a) the total amount of capital stock authorized; (b) the amount of stock already issued for cash payable by instalments and the amount paid thereon; also the amount of full paid stock already issued for cash, property, services or expenses; (c) the amount of additional stock to be issued for cash, property, services or expenses respectively; (d) a description of said property, and a statement of the nature of said services or expenses, in the manner required by the provisions of section eleven.

B. Rights and Duties of Stockholders.

1. Nature of Stockholder's Right.

Stokes v. Continental Trust Co. 186 N. Y. 285.

The Continental Trust Company, a banking corporation, increased its capital stock and by resolution of the stockholders sold the increase to Blair & Company, a firm of private brokers,

at a price considerably above par. Stokes, a stockholder of the Trust Company, brings a bill to compel the corporation to issue to him at par such proportion of the increase of capital stock as the shares held by him may bear to the number of shares originally issued.

Held, that a stockholder has a right to a proportionate share of new stock issued upon an increase of capitalization.

Vann, J.

What is the nature of the right acquired by a stockholder through the ownership of shares of stock? What rights can he assert against the will of a majority of the stockholders and all the officers and directors? While he does not own and cannot dispose of any specific property of the corporation, yet he and his associates own the corporation itself, its charter, franchises and all rights conferred thereby, including the right to increase the stock. He has an inherent right to his proportionate share of any dividend declared, or of any surplus arising from dissolution, and he can prevent waste or misappropriation of the property of the corporation by those in control. Finally, he has the right to vote for directors and upon all propositions subject by law to the control of the stockholders, and this is his supreme right and main protection. Stockholders have no direct voice in transacting the corporate business, but through their right to vote they can select those to whom the law entrusts the power of management and control.

A corporation is somewhat like a partnership, if one were possible, conducted wholly by agents, where the co-partners have power to appoint the agents, but are not responsible for their acts. The power to manage its affairs resides in the directors, who are its agents, but the power to elect directors resides in the stockholders. This right to vote for directors and upon propositions to increase the stock or mortgage the assets, is about all the power the stockholder has. So long as the management is honest, within the corporate powers, and involves no waste, the stockholders cannot interfere, even if the administration is feeble and unsatisfactory, but must correct such evils through their power to elect other directors. Hence, the power of the individual stockholder to vote in proportion to the number of his shares, is vital and cannot be cut off or curtailed by the action of all the other stockholders even with the cooperation of the directors and officers.

In the case before us the new stock came into existence through the exercise of a right belonging wholly to the stockholders. As the right to increase the stock belonged to them, the stock when increased belonged to them also, as it was issued for money and not for property or for some purpose other than the sale thereof for money. By the increase of stock the voting power of the plaintiff was reduced one-half, and while he consented to the increase he did not consent to the disposition of the new stock by a sale thereof

to Blair & Company at less than its market value, nor by sale to any person in any way except by an allotment to the stockholders. The increase and sale involved the transfer of rights belonging to the stockholders as part of their investment. The issue of new stock and the sale thereof to Blair & Company was not only a transfer to them of one-half the voting power of the old stockholders, but also of an equitable right to one-half the surplus which belonged to them. In other words, it was a partial division of the property of the old stockholders. The right to increase stock is not an asset of the corporation any more than the original stock when it was issued pursuant to subscription. The ownership of stock is in the nature of an inherent but indirect power to control the corporation. The stock when issued ready for delivery does not belong to the corporation in the way that it holds its real and personal property, with power to sell the same, but is held by it with no power of alienation in trust for the stockholders, who are the beneficial owners and become the legal owners upon paying therefor. The corporation has no rights hostile to those of the stockholders, but is the trustee for all, including the minority. The new stock issued by the defendant under the permission of the statute did not belong to it, but was held by it the same as the original stock when first issued was held in trust for the stockholders. It has the same voting power as the old, share for share. The stockholders decided to enlarge the holdings, not by increasing the amount of each share, but by increasing the number of shares. The new stock belonged to the stockholders as an inherent right by virtue of their being stockholders, to be shared in proportion upon paying its par value or the value per share fixed by a vote of a majority of the stockholders, or ascertained by a sale at a public auction. While the corporation could not compel the plaintiff to take new shares at any price, since they were issued for money and not for property, it could not lawfully dispose of those shares without giving him a chance to get his proportion at the same price that outsiders got theirs. He had an inchoate right to one share of the new stock for each share owned by him of the old stock, provided he was ready to pay the price fixed by the stockholders. If so situated that he could not take it himself, he was entitled to sell the right to one who could, as is frequently done. Even this gives an advantage to capital, but capital necessarily has some advantage. Of course, there is a distinction when the new stock is issued in payment for property, but that is not this case. The stock in question was issued to be sold for money and was sold for money only. A majority of the stockholders, as part of their power to increase the stock, may attach reasonable conditions to the disposition thereof, such as the requirement that every old stockholder electing to take new stock shall pay a fixed price therefor, not less than par, however, owing to the limitation of the statute. They may also provide for a sale in parcels or bulk at public auction, when every stockholder can bid the same as strangers. They cannot, however, dispose of it to strangers against the protest of any stockholder who insists that he has a

right to his proportion. Otherwise the majority could deprive the minority of their proportionate power in the election of directors and of their proportionate right to share in the surplus, each of which is an inherent, preemptive and vested right of property. It is inviolable and can neither be taken away nor lessened without consent, or a waiver implying consent.

A share of stock is a share in the power to increase the stock, and belongs to the stockholders the same as the stock itself. When that power is exercised, the new stock belongs to the old stockholders in proportion to their holding of old stock, subject to compliance with the lawful terms upon which it is issued. When the new stock is issued in payment for property purchased by the corporation, the stockholders' right is merged in the purchase, and they have an advantage in the increase of the property of the corporation in proportion to the increase of stock. When the new stock is issued for money, while the stockholders may provide that it be sold at auction or fix the price at which it is to be sold, each stockholder is entitled to his proportion of the proceeds of the sale at auction, after he has had a right to bid at the sale, or to his proportion of the new stock at the price fixed by the stockholders.

We are thus led to lay down the rule that a stockholder has an inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation, and while he can waive that right, he cannot be deprived of it without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. This rule is just to all and tends to prevent the tyranny of majorities which needs restraint, as well as virtual attempts to blackmail by small minorities which should be prevented.

2. Relation of Stockholder to Corporation.

Smith v. Hurd. 12 Metc. (Mass.) 371.

Smith, a stockholder of the Phoenix Bank, sues the directors of the bank for its failure, which was caused by their negligence and lack of skill.

Held, that a stockholder cannot maintain an action against officers of a corporation on a liability incurred to the corporation.

Shaw, C. J.

There is no legal privity, relation, or immediate connection, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the

whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it. The very purpose of incorporation is to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps it is not too much to say, the utter impracticability, of such a number of persons acting together in their individual capacities. The practical difficulty would be nearly as great, whether it were held that all must join in an action to recover damage for an injury to the common property, or that each might sue separately.

The stockholders do, indeed, ordinarily elect the directors; but it is as parts and members of the corporation, in their corporate capacity, in modes pointed out by the charter and by-laws, so that the directors are the appointees of the corporation, not of the individuals.

The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body, and exercise such powers as the organization of the institution gives them. Stockholders in banks have a separate right to dividends, when declared, and to a distributive share of the capital stock, if any remains when the charter of the bank is at an end, and its debts paid.

The injury done to the capital stock by wasting, impairing and diminishing its value, is not, in the first instance nor necessarily, a damage to the stockholders. It is an indirect, contingent and subordinate interest, which each stockholder has, in damages so to be recovered against directors.

Stockholders have a remedy, a theoretic one indeed, and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy, through the powers thus vested in the corporation, for the common benefit.

3. Right to Inspect Books.

Shea v. Parker. 234 Mass. 592.

Shea, a stockholder of the Nonquitt Spinning Company, seeks a decree requiring the company to allow inspection of its stock and transfer books. The Company refuses on the ground that

the sole motive of Shea in asking for the examination was for purposes connected with his business as a stock broker.

Held, that while at common law a stockholder may inspect books of a corporation only for proper purposes, by statute he may do so without regard to his motives.

Braley, J.

By St. 1903, "the stock and transfer books of every corporation, which shall contain a complete list of all stockholders, their residences and the amount of stock held by each, shall be kept at an office of the corporation in this commonwealth for the inspection of its stockholders. If an officer or agent of a corporation having charge of such books refuses or neglects to exhibit them or to submit them to examination, he or the corporation shall be liable to any stockholder for all actual damages sustained by reason of such refusal or neglect, and the supreme judicial court or the superior court shall have jurisdiction in equity, upon petition of a stockholder, to order any or all of said books to be exhibited to him and to such other stockholders as may become parties to said petition, at such a place and time as may be designated in the order."

It is settled that at common law the court will determine if a stockholder's desire for examination not only is reasonable, but has "reference to the interests of the corporation and his personal interest as a member of it." And ordinarily relief by mandamus is not given unless it appears that the interest or rights of the petitioner as a stockholder are likely to be seriously prejudiced and affected.

It may be presumed that before enacting the statute the legislature considered the possibility that information thus obtained might, as in the case at bar, have a commercial value distinct and quite apart from the stockholder's interest as a corporate member, and undoubtedly could have made the right of examination dependent upon the motive actuating the stockholder. It has not however so done. The words conferring the right are unlimited, and the statute is mandatory. While a stockholder's right to examine the general books of account to ascertain the volume of business transacted, and the method and efficiency of corporate management, is left as at common law, the stock and transfer books by the statute are at all times to be exhibited under reasonable conditions for his full examination. The right also includes making of copies and transcripts as well as the assistance of counsel and copyists for such purpose. The statute when viewed in the light of its origin should not be so construed as to reduce the right to a useless inquiry, which it necessarily would be in most cases unless the stockholder is permitted to copy the names, residences and number of shares of the stockholders. We are therefore of opinion that instead of being merely declaratory, or limiting the right to the sound discretion of the court, the statute was intended to do away with the restrictions imposed at common law on the examination of the stock and transfer books of a domestic corporation.

4. Liability of Stockholder.

Trustees of The Free Schools in Andover v. Flint. 13 Metc. (Mass.) 539.

The trustees of the Free Schools sue Flint as a stockholder of the Andover Mechanic Association upon a note of that corporation signed by him as treasurer. A by-law of the corporation provided that members of the corporation should be personally liable for its debts. Flint contends that the by-law is invalid.

Held, that stockholders of a corporation are not personally liable for its debts.

Dewey, J.

Individual liability, as incident to membership of a corporation, arises only from express legislative enactment, either in the charter, or by some general law, to which all similar corporations and their individual members are made subject. But there is no general law applicable to this species of corporations, such as exists in reference to manufacturing corporations, or corporations for banking purposes, providing certain liabilities on the individual stockholders of such corporations, in certain specified cases.

The only effect that can be given to this by-law is that of an act or vote of the members of the corporation acting in their corporate capacity. It is not the act of any individual member, nor does the fact of its being found upon the records of the corporation, as a vote duly adopted, authorize the inference that all or that any number greater than a bare majority voted for its adoption. The question then arises, whether it be competent for an aggregate corporation, whose act of incorporation imposes no individual liability upon its members for the debts and contracts of such corporation, to render, by force of a by-law, each individual member a guarantor or security for all moneys lent to the corporation. It is clearly quite foreign from the general purposes and objects in reference to which by-laws are authorized to be made by corporate bodies.

It is not, in the opinion of the court, within the corporate powers conferred upon this and similar corporations, to impose upon their members by any such by-law any personal and individual liability to third persons, beyond such as are specified in the charter, or in the general laws of the commonwealth. Such a power would be liable to great abuse, and would subject every member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation by the act of a majority of those convened at a meeting of such corporation. Take the case of a bank in doubtful credit, and its active managers deem it useful to sustain it by pledging the individual responsibility of some of its more wealthy stockholders. Can they, by a corporate vote, impose upon all the stockholders a personal lia-

bility for all the debts of the corporation? We think not, and are of opinion that each stockholder, by becoming such, subjects himself to no liability beyond that created by the force of the charter itself, or declared by other statutes of the commonwealth.

5. Power of Legislature to Increase Liability of Stockholder.

Ireland v. The Palestine Etc. Turnpike Co. 19 Oh. St. 369.

A statute authorized turnpike companies to issue, for the purpose of completing their roads, bonds upon which stockholders should be individually liable to the extent of their stock. The plaintiff Turnpike Company, of which Ireland was a stockholder, accepted this act and now seeks to hold Ireland to this increased liability.

Held, that an act whereby a corporation may increase the liabilities of its stockholders is unconstitutional.

Welch, J.

In our judgment, the act in so far as it authorizes assessments against stockholders who have paid the full amount of their subscriptions, and who by the charter of the company, or the laws under which it was organized, were not individually liable for its debts, is unconstitutional. It impairs the validity of the contract between the company and the stockholder. In a contract between the company and a stockholder, or in an action by the former, or its creditors, against the latter, the stockholder is to be regarded as an individual person, separate and distinct from the corporation. He becomes a stockholder by virtue of a contract with the company, and he has a right to stand upon the terms of that contract, interpreted and limited by the laws under which it was made. By his contract with this company Ireland agreed to pay a specified sum, and no more. This sum he has fully paid, and to require him to contribute an additional amount, would be to violate the contract between the parties. Let it be understood that the amount for which a stockholder becomes liable to the company by his subscription is not limited by his contract, but by the discretion of the directors, or the stockholders at large, and no prudent man will subscribe for stock in a corporation. If such be the law, it is of little importance to the subscriber whether the amount of stock taken be large or small, because it can be indefinitely increased at the pleasure of the company, whenever the legislature sees proper to give the power to do so. If a subscriber contracts to pay a sum which he deems within his means of payment, he may be called upon to contribute an amount utterly beyond those means, and which may render him bankrupt. No subscriber would be safe under such a law, or have any rule by which to determine the amount of stock he could afford to take. In vain would he look to the charter of the company, or to the provisions of the constitution

and subsisting laws of the state, to learn the nature and extent of the liability he was about to incur, if that liability can, at the pleasure of the legislature, be indefinitely increased or modified by retroactive laws.

We fully agree with counsel that the stockholder may waive his constitutional right, and become liable by his own act or consent. For this purpose, it is not even necessary he should give his express or direct consent. It may be implied or he may be estopped from denying it by his acts or by his silence and apparent acquiescence. But there is nothing in the present case, either in the company's petition or in the bill of exceptions, to show any such assent or acquiescence on the part of Ireland. He is not shown to have been present at the meeting of the directors when the bonds were ordered to be issued, nor at the meeting of the stockholders when the assessment was made. We cannot presume his assent to these proceedings, or his acquiescence in them, from the mere fact that they took place.

6. Liability Upon Stock Not Fully Paid.

The Easton National Bank v. The American Brick & Tile Co.
70 N. J. E. 732.

In settling the affairs of the American Brick & Tile Company, an insolvent corporation, Green presented a claim for money lent by himself to the corporation, of which he was secretary and treasurer. The question arises whether Green is entitled to consideration of his claim in a proceeding brought by the receiver against Green and other stockholders to recover the unpaid balance of their stock subscriptions.

Held, that any creditor may hold stockholders of a corporation to full payment for their stock.

Pitney, J.

There is a line of reported cases holding that stockholders who participate or aid in the issue of paid-up stock upon payment of less than its par value, or who have knowledge of the act and acquiesce therein, cannot afterwards complain of the transaction, either as stockholders or as creditors. So far as we have observed, however, all well considered decisions that adopt this doctrine are based upon general principles of equity, in the absence of any controlling statute or public policy, resort being had alone to the "trust fund theory," as a basis for the stockholder's liability to creditors. The theory of these cases is that, as between stockholder and the company, there is no absolute liability to pay for his stock in full, and no legal prohibition standing in the way of an agreement that the stock shall be issued to him for less than full payment. An agreement to this effect is therefore treated as valid between the parties, and subject to avoidance only at the instance of those creditors who have been

defrauded by their reliance upon the stock issues as representative of capital actually paid in to the company.

The "trust-fund theory" has been repeatedly adopted by the courts of this state to the extent that it deals with the capital stock paid in or subscribed for as a fund for the payment of debts of which the directors are trustees, so that they cannot dispose of it to the prejudice of creditors without an equivalent consideration, nor defeat the trust by accepting any simulated payment of a stock subscription, or by any other device short of actual payment in good faith.

But so far as this so-called "trust-fund doctrine" excludes any creditors from relief against the stockholders, it does so on the theory that the liability of the latter rests alone upon their having held out the capital of the company to persons extending credit to it as the source from which repayment might be expected. If this be the only foundation of the stockholder's liability, it is perhaps not irrational to debar creditors whose claims accrued prior to the stock issue in question, and subsequent creditors who had notice when they extended credit that the stock issue did not represent in whole or in part what it purported to represent—that is, an equivalent amount in value added to the assets of the company.

But in this state the stockholder's liability to creditors does not depend alone or chiefly upon the theory of "holding out." It depends upon the stockholder's voluntary acceptance, for consideration touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien, and which requires stock contributions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had notice and those who had none.

The express prohibition [that nothing but money or property shall be considered as payment of capital stock] and the whole spirit and policy of the act are so clearly opposed to any arrangement by which corporate stock shall be issued without receipt by the company of an equivalent in value to its par that any agreement to this effect must be deemed void as contrary to the policy of the law.

We do not wish to be understood as assenting to the reasoning of the cases so far as they debar from recourse to the stockholder's liability those creditors whose claims accrued before the stock issue in question, and those subsequent creditors who extended credit to the company with knowledge that the stock was issued as full paid when it was not full paid in fact. With respect to prior creditors, the query arises, Why may they not resort to after-acquired property of the company, and as well stock subscriptions as more tangible assets? With respect to subsequent creditors, the query is, Why, if they knew the stock issued as full paid was not full paid in fact, may they not be justified in dealing with the very stockholder's liability thus arising as a part of the assets of the company for the purpose of satisfying creditors' claims? But without spending time in discussion of these questions, we content

ourselves with saying that our Corporation Act places the stockholder's liability to creditors upon a firmer foundation than the "trust-fund doctrine" as expounded in the cases, the statute absolutely prohibiting agreements for the issue of stock for a consideration less than its par value, and affording relief to all creditors without distinction.

7. Liability on Unpaid Subscription: Necessity of Call.

Wm. Braddock Jr. v. The Philadelphia, Marlton & Medford Railroad Co. 45 N. J. L. 363.

The Railroad sues Braddock to recover the sum subscribed by him to the capital stock of the company when it was about to be organized. He contends that there was no proper call for his subscription.

Held, that upon a call for the amount of a subscription to capital stock, the subscriber is bound to pay when notified.

Beasley, C. J.

It is clear that a suit will not lie on a subscription of this kind before such a call has been made. This company is a corporation organized under and by force of the provisions of the general railroad law of this state. By section 7 of that act it is provided "that the directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed in such manner and in such instalments as they may deem proper." In the following clause of this section a particular mode of notification to the stockholder is prescribed in the event of the company's undertaking to enforce the payment of subscriptions by a forfeiture of the stock and of previous payments made by the subscriber. But the former of these clauses, which contains the requisition on the directors to call in the sums subscribed appears applicable in every case of a proceeding to collect the moneys prescribed. A suit at law will not lie until such call has been duly made. But in the present instance, I think the trial judge was right in his holding that the proofs exhibited the proper action in this respect by the board of directors. The facts on this head were these: before this company had been organized, certain of the shareholders, assuming to act in the capacity of directors of the corporation, passed a resolution authorizing the president, secretary and treasurer to require the subscribers to the capital stock of the company to pay the amounts respectively subscribed in such amounts, and in such manner and in such instalments, as they may deem proper. This resolution was void, as it was passed in advance of the legal existence of the corporation. But at a subsequent date, and after the due organization of the company, the directors passed a resolution directing the president to take such proceedings toward the collection of subscriptions as would "most speedily and surely accomplish the object." This was plainly a direction to

the president to collect, not a part, but the whole of the moneys due from subscribers, and was, in substance, a call for the entire amount of the sums subscribed. A notification to a subscriber of this action of the board could have left him in no doubt on this subject. It seems to me that it would be a useless refinement to hold that in addition to a direction to collect the sums due, the directors must add a statement that they call in such sums. A call is nothing more than an official declaration that the sums subscribed are required to be paid. A direction to collect such sums involves, necessarily, such a declaration.

8. Liability on Subscription to Illegal Issue of Stock.

Scovill v. Thayer, 105 U. S. 143.

The assignees of the Fort Scott Coal & Mining Company sue Thayer for unpaid subscriptions to the capital stock of the corporation in order to apply the amount to claims of creditors. The corporation had increased its original capital of \$100,000 to \$200,000, then to \$300,000, and finally to \$400,000. The statute of Kansas under which the corporation was organized allowed increase of capital stock only to an amount double its original capitalization. Consequently the last two issues of stock were illegal. Thayer contends that he is not liable to pay an assessment on the void issues.

Held, that a stockholder is not liable for unpaid subscriptions to a void issue of capital stock.

Woods, J.

As a general rule, corporations can have and exercise only such powers as are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties.

And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all attempts to do so are void.

In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was *ultra vires*. The increased stock itself was, therefore, void. It conferred on the holders no rights and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders, and the stock of the third and fourth by another, in a contest between them, the latter would have been excluded from all participation in the management of the company or in its profits. To decide that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock, is to ignore and override the limitations and prohibitions of the charter. We think it follows that if the holder of such spurious stock has none of the rights, he can be subjected to

none of the liabilities of a holder of genuine stock. His contract to pay for spurious shares is without consideration and cannot be enforced.

We think that [the defendant] is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant.

But here, the corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him or the corporation. A distinction must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which, they have been issued. The holders of shares which the company has no power to issue, in truth had nothing at all, and are not contributors.

9. Powers of Majority Stockholders.

Dudley v. Kentucky High School. 9 Bush (Ky.) 576.

Dudley, a stockholder in the Kentucky High School, an educational corporation, seeks to enjoin the directors from purchasing certain property from Gaines, on the ground that the investment would result in the bankruptcy of the corporation.

Held, that stockholders are bound by the will of the majority within the scope of the business of the corporation.

Lindsay, J.

It is true that a majority of stockholders, no matter how great, have not the right to divert the funds of a joint-stock incorporated company to any other than the purposes for which it was organized; and if such funds are about to be so diverted a stockholder may file a bill in equity against the company to restrain it by injunction from such diversion or misapplication. But relief will not be granted unless the corporation is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution, for so long as it exercises its powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders.

Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only

error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation. Nor does the irregular manner in which the board of directors voted upon the proposition to make the purchase authorize the chancellor to interpose to prevent its consummation. [In the language of Vice-Chancellor Wigram]: "While the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit." So in this case, while it may be that the corporation has the right to avoid the purchase from Gaines because one of the directors, without whose vote the proposition would have been rejected, was allowed to vote by proxy, yet it may be that Dudley is the only stockholder who disapproves of the purchase, and it might result that, at the time the court was protecting him against the payment of his subscription because of the unauthorized action of the directors, a majority of the stockholders in general meeting might ratify or have already ratified the purchase, and bound Dudley under his contract of subscription to submit to their will thus regularly and legally expressed.*

10. Rights of Minority Stockholders.

Stevens v. The Rutland & Burlington Railroad Co. 29 Vt. 545.

Stevens, a stockholder in the Rutland & Burlington Railroad Company, seeks to enjoin it from applying the funds of the corporation to the construction of a railroad from Burlington to Swanton. The Railroad Company was originally incorporated to run from Burlington to some point on the west bank of the Connecticut River, and afterwards secured an act of the legislature amending its charter so that it became authorized to build the road in question. Stevens, as a stockholder in the corporation formed for its original purpose, contends that the act authorizing the contemplated project is unconstitutional in so far as it purports to bind the original stockholders.

Held, that while a minority stockholder is bound by the acts of the majority, the majority may not change the purposes of the corporation.

Bennett, C.

It is conceded that there is a class of alterations in a charter, which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his

* But cf. *Baldwin v. Canfield*, 26 Minn. 43 [p. 352].

subscription, or give him a right to complain in a court of justice, in case he had previously paid it. Where the object of the modification or alteration of the charter is auxiliary to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the individual corporator cannot complain; and I should apprehend it would make no difference with the rights of a corporation, in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules and votes of the company, and there is an implied assent, on his part, with the corporation, that they may apply for, and adopt such amendments as are within the scope, and designed to promote the execution of the original purpose; and he signs, and the corporation receives his subscription, subject to such implied contingency; and if we regard it in the nature of a license only, it would not alter the principle. Both parties having acted upon it, it would not be countermandable.

But suppose the object of the alteration is a fundamental change in the original purpose, and designed to superadd to it something which is beyond and aside of it; does the same principle apply?

In a case where the amendment to the original charter authorized the [Hartford & New Haven Railway Company] to purchase, hold, and run upon [Long Island] Sound, steamboats, in connection with their railway, and gave the company, for that purpose, an increase of capital not exceeding two hundred thousand dollars, [which] amendment was accepted by the directors of the company and by the corporation convened for that purpose, it was held that the alteration was fundamental, and absolved the defendant from all liability for the assessments on his stock; there being no evidence that the defendant had personally assented to an acceptance of the amendment. The assessments were made, and had become payable, and had been demanded of the defendant, before the amendment of the charter. Ch. J. Nelson, in his opinion, lays down this general proposition, "that corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent."

This is a sound proposition. The consent or assent may, however, be implied in a class of cases, as has already been stated, where the amendment is not regarded as fundamental, and can be brought within the scope of the original purpose of the association; and this is going to the very verge of the powers of the corporation. It is difficult, and would be unwise, to attempt to lay down any general rules to determine in what precise cases the assent of the corporator should be implied, and in what not. It is sufficient for the present purpose to say that his assent cannot be implied, in a case like the present, from a majority vote. Courts may differ, and

doubtless will, in regard to what alterations shall be sufficient to constitute a fundamental change. But in the present case, I think, on this point there can be but one opinion.

The franchise granted to this company was territorial; and an extension of the termini necessarily is an extension of the franchise. It cannot remain the same thing in substance, until it can be established that a part is equal to the whole. Besides, the company may increase the capital stock to such additional sum as shall be necessary to construct the extension.*

II. Statutory Liability of Stockholders and Officers.

Massachusetts Acts and Resolves of 1903. Chapter 437.

Section 33. The stockholders of a corporation which reduces its capital stock contrary to the provisions of section forty three shall be liable for the payment of the debts and contracts of the corporation existing at the time of such reduction to the extent of the amount withdrawn and paid to them respectively. The stockholders of a corporation shall also be liable for all money due to operatives for services rendered within six months before demand made upon the corporation and its neglect or refusal to make such payment. A stockholder who pays on a judgment or otherwise more than his proportion of any such debt shall have a claim for contribution against the other stockholders.

Section 34. The president, treasurer and directors of every corporation shall be jointly and severally liable for all the debts and contracts of the corporation contracted or entered into while they are officers thereof if any stock is issued in violation of the provisions of section fourteen, or if any statement or report which is required by the provisions of this act is made by them which is false in any material representation and which they know to be false; but only the officers who sign such statement or report shall be so liable.

Section 35. The directors of every corporation shall be jointly and severally liable for the debts and contracts of the corporation in the following cases:

First. For declaring or assenting to a dividend if the corporation is, or thereby is rendered, bankrupt or insolvent, to the extent of such dividend.

Second. For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.

Directors who vote against declaring said dividend or who vote against making said loan shall not be liable as aforesaid.

* Cf. Mass. Acts and Resolves of 1903, Ch. 437, § 40 [p. 365].

III.

ADMINISTRATION AND DISSOLUTION.

The board of directors is the managing body of the corporation. It has general superintendence and active management of its affairs, and constitutes the corporation for all purposes of dealing with others. The directors have a direct, not a delegated authority. They may appoint agents for the conduct of business and may in general transact business in the manner which seems to them to be best. They must always exercise their honest judgment in matters pertaining to the corporation and may not use their position in a way to secure private advantages to themselves. In the absence of statute, they are under no further personal liability, as long as they conform to these requirements.

The board of directors must in most states be composed of at least three directors, although there is ordinarily no maximum number designated. When a large board is authorized, an executive committee is usually appointed, which in that event has control of the active administration of corporate affairs. Most states require that the directors shall be stockholders of the company, and in some jurisdictions at least one member of the board must be a resident of the state. Times and places for regular meetings of the directors are fixed by the by-laws. Other meetings are held upon call. As the corporation is entitled to the discretion and best judgment of the directors acting as a board, actual attendance by the directors in order to participate in the corporate management is necessary, and proxies may not be given by them.

It is in the discretion of the directors to declare dividends when the business of the corporation warrants their payment. Dividends may properly be declared only out of surplus or net profits. If they are declared in such a way that the capital of the corporation is impaired and the corporation thereby rendered insolvent, creditors may hold the directors for such improper declaration of dividends.

The officers of the corporation have such authority as the charter and by-laws give them, and in addition have the ostensible authority of any agent in a like situation.

Stockholders as such have no right to interfere in the management of the corporation and may not question the exercise of judgment by the directors. If the corporate affairs are not properly administered, the corporation itself is the proper party to bring suit against directors for negligence or fraud, and it is only when the corporation is unwilling or unable to hold the directors to account that stockholders will be heard.

While the directors ordinarily have authority to direct the business of the corporation in all respects, by statute, certain transactions must be authorized by the stockholders. The particular nature of these transactions is usually statutory and accordingly differs in the different states. In general, they include the election of officers, amendments of the charter or by-laws and such changes in the business or capitalization of the corporation as are not contemplated by the charter or by-laws.

Each stockholder of record is entitled to one vote for each share of stock held by him at stockholders' meetings, which are prescribed by statute or the by-laws, or are called by the properly designated officers. These votes may be by proxy, as a stockholder's personal exercise of discretion is not considered of prime importance on account of the fact that his right to participate in the corporate management is limited to the election of officers and the determination of matters of policy indicated in the call for the stockholders' meeting. This principle also allows the limited surrender of a stockholder's right to vote his own stock by means of a voting trust or otherwise.

Corporations may be dissolved and lose their legal existence by act of the legislature, or by forfeiture or surrender of their charter, or at common law, by death of all the members. The manner of dissolution is prescribed by statute, and the particular rights and liabilities arising from dissolution are also largely statutory. In general, the property of the corporation becomes a fund to be divided among the shareholders in accordance with their respective interests after creditors are satisfied. The corporate existence is ordinarily extended by statute even after dissolution for the purpose of winding up and settling its affairs.

A. Management of Corporate Affairs.

1. Business Conducted by Directors.

Charlestown Boot & Shoe Co. v. Dunsmore. 60 N. H. 85.

The Charlestown Boot & Shoe Company brings suit against two of its directors for refusal to act with a third person, Osgood, whom the stockholders elected to cooperate with the directors in settling the affairs of the corporation.

Held, that the management of a corporation is in the hands of directors, who are not obliged to act with third persons.

Smith, J.

The provision of the statute is that the business of a dividend

paying corporation shall be managed by the directors. The statute reads, "The business of every such corporation shall be managed by the directors thereof, subject to the by-laws and votes of the corporation, and under their direction by such officers and agents as shall be duly appointed by the directors or by the corporation." The only limitation upon the judgment or discretion of the directors is such as the corporation by its by-laws and votes shall impose. It may define its business, its nature and extent, prescribe rules and regulations for the government of its officers and members, and determine whether its business shall be wound up or continued; but when it has thus acted, the business as thus defined and limited is to be managed by its directors, and by such officers and agents under their direction as the directors or the corporation shall appoint. The statute does not authorize a corporation to join another officer with the directors, nor compel the directors to act with one who is not a director. They are bound to use ordinary care and diligence in the care and management of the business of the corporation, and are answerable for ordinary negligence. There is no difference in this respect between the agents of corporations and those of natural persons, unless expressly made by the charter or by-laws. It would be unreasonable to hold them responsible for the management of the affairs of the corporation if compelled to act with one who to a greater or less extent could control their acts. The statute not only entrusts the management of the business of the corporation to the directors, but places its other officers and agents under their direction. When a statute provides that powers granted to a corporation shall be exercised by any set of officers or any particular agents, such powers can be exercised only by such officers or agents, although they are required to be chosen by the whole corporation; and if the whole corporation attempts to exercise powers which by the charter are lodged elsewhere, its action upon the subject is void. The vote choosing Osgood a committee to act with the directors in closing up the affairs of the plaintiff corporation was inoperative and void.

2. Nature of Management by Directors.

Hoyt v. Thompson's Executor. 19 N. Y. 207.

Hoyt seeks to enforce a bond and mortgage made by the Long Island Railroad Company to the Morris Canal & Banking Company, through whose receivers he claims. The estate of Thompson claims rights in the mortgage under a previous assignment made by a minority of the directors of the Canal & Banking Company to him. Hoyt contends that the previous assignment was invalid on the ground that it was not the act of the corporation, even though the by-laws authorized the transaction of business by less than a majority of the directors.

Held, that the management of the affairs of a corporation is

invested in the directors acting under suitable by-laws; and that their authority is not delegated.

Comstock, J.

The first inquiry suggested by the facts stated is whether the by-law of the company authorizing a quorum of five directors, including the president, to transact ordinary business was a valid regulation. We are clearly of opinion that it was. The charter of the company, it is true, declared that its powers should be exercised by a board of twenty three directors, and it may well be conceded that in the absence of any different regulation, a majority of the whole number would be necessary to constitute a legal quorum for the transaction of any business whatever. But it would be very extraordinary construction of the charter in this respect, to hold that the board of twenty three directors, or a majority thereof, must meet and act whenever any corporate power was to be exercised, and that no delegation of authority could be made to subordinate agents, to committees, or to a quorum consisting of a smaller number. The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and if the power of substitution is not conferred in the appointment, it cannot exist at all. But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. Without it the most ordinary business could not be carried on, and the corporate powers could not be executed. It is upon this principle, not less than upon the express power contained in the charter to enact by-laws, that the by-law in question adopted by the Morris Canal and Banking Company, rests. It was, in substance and effect, a regulation which constituted a subordinate agency to conduct the ordinary business of the corporation. The persons composing the agency would change according as the quorum of five or more directors attending the meetings might be constituted of different individuals. But if the board could delegate the power of transacting business to five or more individuals named, no doubt exists that the same authority might be imparted to a shifting quorum composed of the same number.

3. Necessity that Directors Act as Board.

Baldwin v. Canfield. 26 Minn. 43.

Baldwin, on behalf of creditors, brings this bill for the cancellation of a deed given by the Minneapolis Agricultural & Mechanical Association to Canfield. The deed was executed by the directors, who signed separately and at different times, without any meeting authorizing the conveyance of the property.

Held, that directors of a corporation may exercise their powers only as a board.

Berry, J.

By its articles of incorporation, the government of the Minneapolis Agricultural and Mechanical Association, and the management of its affairs, was vested in the board of directors. The legal effect of this was to invest the directors with such government and management as a board, and not otherwise. This is in accordance with the general rule that the governing body of a corporation, as such, are agents of the corporation only as a board, and not individually. Hence it follows that they have no authority to act, save when assembled at a board meeting. The separate action, individually, of the persons composing such governing body, is not the action of the constituted body of men clothed with corporate powers. In Vermont it is held that directors may bind their corporation by acting separately, if this is their usual practice in transacting the corporate business. But we think that the general rule before mentioned is the more rational one, and it is supported by the great weight of authority. From the application of this rule to the facts of this case, it follows that the conclusion of law, viz., that the deed purporting to be made by the association was not the act and deed of such association, and therefore did not convey the title to the premises in question to Canfield, is correct. The directors took no action as a board with reference to the sale of the premises or the execution of any deed thereof. So far as in any way binding the corporation is concerned, their action in executing the deed was a nullity. They could not bind it by their separate and individual action. Hence it follows that the so-called deed is not only ineffectual as a conveyance of real property, but equally so as a contract to convey.

4. Effect of Disqualification of Director.

Kuser v. Wright. 52 N. J. E. 825.

Wright, receiver of the Ott & Brewer Company, seeks to set aside mortgages given to Kuser and others to secure a pre-existing indebtedness. He contends that two directors had no power to establish a lien upon corporate property in the absence of the third

director, who had made an assignment for the benefit of creditors and had left the state.

Held, that as to third persons a corporation may properly act by *de facto* officers.

Van Syckel, J.

Our act concerning corporations, section 16, provides:

"That the business of every such corporation shall be managed and conducted by the directors thereof, who shall respectively be shareholders therein."

Section 17 provides:

"The directors shall not be less than three in number, and they shall be chosen annually by the stockholders at such time and place as shall be provided by the by-laws of the company, and shall hold their office for one year, and until others are chosen and qualified in their stead."

Section 20 provides that:

"when any vacancy occurs among the directors, or secretary or treasurer, by death, resignation, removal or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company."

Section 47 provides that:

"it shall not be lawful for any person to be elected a director of any body corporate in this state issuing stock unless that person shall be, at the time of his election, a bona fide holder of some of the stock thereof."

Section 48 provides that:

"when any person, a director of any body corporate, shall cease to be a bona fide holder of some of the stock thereof, he shall cease thereupon to be a director thereof."

The point made against these mortgagees is that under our statute there must be at least three directors to manage the corporate business; that by the assignment made by Bell for the benefit of his creditors he ceased to be a stockholder, and by force of the statute ceased at the same time to be a director of the company, thereby leaving the corporation without a board of directors legally qualified to conduct its affairs.

That such a result justly or legally flows from these premises cannot be conceded. It is apparent that dealing with these corporate bodies would be in the highest degree hazardous and unsafe if the public, without notice in fact, is chargeable in law with knowledge of a latent infirmity in the title of every director of the company. A doctrine so destructive to the security of commercial transactions, now so largely conducted by corporate action, has no support in the law. The receiver stands for the corporation, and cannot impeach any act which the corporation itself could not successfully assail.

Bell's original title to the office of director was good; it is not denied that he was legally elected. The corporation held him out

to the public as one of its duly authorized agents by failing to declare his office vacant and electing his successor.

If a body of men, acting as a corporation, permits certain persons to act openly as corporate officers, or if it is permitted by the directors, assuming them to have had the power to appoint the officers in question, the corporation will not, to the detriment of persons who, in good faith, have acted on the assurance that the persons acting as officers were the officers they assumed to be, be permitted to impeach the validity of their acts and contracts on the ground that such persons were not legally corporate officers.

5. Interference by Stockholder Ordinarily Impossible.

Ellerman v. The Chicago Junction Railways & Union Stockyards Company. 49 N. J. E. 217.

Ellerman, a stockholder in the defendant Company, seeks to enjoin it from carrying into effect an agreement made with Armour & Company and others relative to a combination of interests which Ellerman considers injurious to the corporation.

Held, that a stockholder cannot interfere in the management of a corporation by the directors so long as they act in good faith.

Green, V. C.

The theory of the suit is, that the agreement will be an injury, primarily, to the company and, incidentally, to him as a stockholder; that appeal to the present directors to protect the company and stockholders will be futile, as they have decided otherwise, and, therefore, he asks to be permitted to act for himself and others in like position. The only damages with which complainant, as a stockholder, can be threatened are to the security of his investment, and to the dividends he expects to receive—whether the latter is imminent depends mainly upon the probable results of the arrangement challenged, as a business operation. As a holder of preferred stock, his fixed yearly dividend is secured by the articles of incorporation, while the dividend on his common stock must depend on the success of the business and the action of the directors, for such dividends may be lawfully diminished if the diversion of the same be for a purpose which is within the corporate powers, unless the non-declaration of them be in fraud of the rights of the stockholders. Nor is it his right to challenge action which he may deem dangerous to his investment absolute. Individual stockholders cannot question, in judicial proceedings, the corporate acts of directors, if the same are within the powers of the corporation, and, in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment. Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to

advance corporate interests, are left solely to the honest decision of the directors if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation.

6. When Stockholder May Interfere.

Brewer v. The Boston Theater. 104 Mass. 378.

Brewer and other stockholders of the Boston Theater seek to recover for the benefit of the corporation profits personally realized by certain of its officers. These officers leased corporate property to parties with whom they secretly conspired to share in the advantages of the contract.

Held, that when redress cannot be gained through the corporation, stockholders may bring action for injury to corporate property by the officers.

Wells, J.

It is unquestioned that, at law, no action could be maintained for the causes set forth, otherwise than in the name and by the authority of the corporation itself. Ordinarily the same rule will apply in equity. It is only from the necessity of the case, and to prevent a failure of justice, that suits in equity in the form of these bills are allowed. To justify a suit in this form, the bill must show that suitable redress is not attainable through the action of the corporation. To this extent, all authorities agree. There is some diversity as to what will satisfy the requirement. Whether there must be an effort to move the corporate body to the redress of its own injuries; and, to that end, an attempt to procure a meeting and vote of the stockholders; or whether an application to the present board of officers by whom the corporate affairs are managed, and a refusal by them to allow proceedings in its name and behalf, would be sufficient, does not seem to have been determined by any clear concurrence of decision. It may depend somewhat upon the character of the corporate organization, and the extent of powers confided to its officers for the time being. Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant. A formal application and refusal need not be alleged, if enough appears to show that such an application would be unavailing. When the directors themselves are the parties charged with the wrong, or by whose fraud or wilful collusion

the wrong has been accomplished, and the suit is to be brought against them, they are, by the very nature of the case, incapacitated for the service of representing the corporation in any action for the restoration of its rights. If the corporate action is under the control of such parties, it is a sufficient reason of necessity to warrant proceedings by suit in the name and behalf of the individual stockholders.

In our opinion, the facts show such abuse of authority and breaches of trust by the defendants, in misappropriating the income of the corporate property to the benefit of themselves or of some of them, as cannot be ratified or remitted by the corporation; and also such incapacity of the plaintiffs to move the corporation to take action for their redress, as entitles them, from necessity, to seek it in the form of these proceedings.

7. Right of Stockholders to Vote.

Pender v. Lushington. L. R. 6 Ch. D. (Eng.) 70.

Pender sues the Direct United States Cable Company, Ltd., and the directors of the Company to establish the right to have votes given by him and others at a stockholders' meeting made effective. These votes were rejected in part on the ground that they were given for a purpose inconsistent with the best interests of the corporation.

Held, that the motive of a stockholder in voting is not open to attack.

Jessel, M. R.

In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise—that is as regards a court of law as distinguished from a court of morality or conscience, if such a court exists. I put to Mr. Harrison, as a crucial test, whether, if a landlord had six tenants whose rent was in arrear, and three of them voted in a way he approved of for a member of parliament, and three did not, the court could restrain the landlord from distraining on the three who did not, because he did not at the same time distrain on the three who did. He admitted at once that whatever the motive might be, even if it could be proved that the landlord had distrained on them for that reason that I could not prevent him from distraining because they had not paid their rent. I cannot deprive him of his property, although he may not make use of it in a way I might altogether approve. That is really the question, because if these shareholders have a right of property, then I think all the arguments which have been addressed to me as [to] the motives which induced them to exercise it are entirely beside the question.

This being so, the arguments which have been addressed to me as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shows a want of appreciation of the principles on which this company was founded, appear to me to be wholly irrelevant. Therefore I do not intend to enter into the question as to what the objects of the company were, or what was the mode in which it was proposed to carry out those objects. I am only bound to decide whether or not these people were entitled to vote.

8. Voting by Proxy.

Cone v. Russell. 48 N. J. E. 208.

The plaintiffs bring a bill to set aside an irrevocable proxy given to the defendants to vote the plaintiffs' stock in the Upper Delaware River Transportation Company. The defendants agreed so to vote the stock that one of the plaintiffs should be employed at a salary of \$2,500 a year.

Held, that an irrevocable proxy is invalid when the purposes for which it is granted are improper.

Pitney, V. C.

Our legislature has authorized the use of proxies, limiting them, however, to three years. But the principle still remains that the proxy is supposed to vote for the principal and in his interest. If a majority of the stock is owned by one person, he has no right to use his power as such owner to advance his private interests at the expense of the minority. And, in like manner, he has no right to depute to another, who has little or no interest in the corporation, a power to use his stock for that purpose. Such deputation is the more dangerous because the person entrusted with the power has no such inducement to promote the interests of the corporation as the stock owner has. Where the majority of the stock is owned by one man or set of men, acting in concert, the minority are, to some extent, protected by the natural interest of the majority to promote the real interest of the corporation. But where a person, who has little or no actual ownership, has the unrestricted voting power of a majority of the stock, the minority loses this protection, and what may be properly termed the underlying and fundamental understanding and contract upon which the association is founded is abandoned and broken.

The motive which may induce the owner of a controlling interest in the corporation to deprive himself of and depute to another the power to use it as he may see fit, during a fixed period, may be of little consequence to his associates, but is usually found in some consideration of personal gain. In the case in hand it is the employment

of complainant L. H. Cone as manager for a fixed term at a fixed salary, and irrespective of the actual value of his services. The avowed object and purpose of the defendants was to secure to themselves like employment and salaries. The mere statement of the affair seems to me to condemn it. The motive was in itself improper and unlawful. Servants of a corporation should be employed and paid upon their merits, and buying votes for an office in a corporation is of the same objectionable character as buying them for a public office. The same may be said of buying the right to control the business policy and management of the affairs of the corporation.

I conclude that the contract complained of in this suit is void as against public policy. This conclusion does not reach so far as necessarily to forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders. The propriety of the object validates the means and must affirmatively appear.

9. Cumulative Voting.

Bridgers v. Staton. 150 N. C. 216.

The plaintiff seeks to compel the reconvening of a meeting of the stockholders of a corporation in order that he may receive proper representation under a statute authorizing cumulative voting.

Held, that a statute may provide for cumulative voting.

Clark, C. J.

The statute provides that if "at the time of the election of the directors, managers or trustees" of a corporation it appears from the transfer book or otherwise that more than one-fourth of the capital stock is owned or controlled by one person (which, of course, includes corporations,) the stockholders shall have the right of cumulative voting "in the election of the directors, managers or trustees of such corporation," with a proviso that the minority stockholders shall openly announce in such meeting held for such election that they will exercise such right of cumulative voting. The right, if thus publicly claimed by any minority stockholder (and the plaintiff held less than a majority of all the stock), is given whenever it appears (as it did here) that any one person owns or controls more than one-fourth of the capital stock, whatever the amount of his stock. Whenever it is given, it is allowed "to each stockholder." Such right is not given generally, but only in the election of officers. It could not apply to other matters, as the motion to adjourn, for instance, where there is only one proposition and nothing to "cumulate" upon. If directors had been voted for, the plaintiff was entitled to vote cumulative. It may be noted that whether the voting is cumulative or not, whenever more than one is voted for at the same

time, double such number, minus one, might receive a majority. For instance, in this case, if there were 1,600 shares and each voted for five directors, 8,000 names would be on the ballots and nine men (twice five, minus one) could receive 801 votes or more, i.e., a majority of 1,600.

10. Voting Trusts.

Luthy v. Ream. 270 Ill. 170.

Ream held 2,001 of the 4,000 shares of the Peru Plough & Wheel Company, as trustee under a voting trust declared irrevocable for a term of years. Seventy of the shares held in the voting trust were assigned to Cahill, who demanded from the trustee the release and delivery to him of this number of shares. Upon refusal by Ream, Cahill and other stockholders not in the trust seek its cancellation as to Cahill.

Held, that a voting trust is illegal if its effect is to place the management of the corporation in hands other than those of its stockholders.

Dunn, J.

The effect of the agreement was to place the legal title of the majority of the stock in Henry Ream, who was given the power to vote the stock for ten years upon all questions and at every meeting of the stockholders according to his own discretion, uncontrolled by the stockholders in any way. He then owned 37 shares of stock, and thus the entire control of the corporation was conferred upon the owner of less than one per cent of the stock, with no power in the owners of the remaining ninety-nine per cent to interfere in any way. We have held that it is legitimate for the owners of a majority of the stock of a corporation to combine for the purpose of controlling the corporation. In this case, however, the agreement goes much further than any case which has heretofore arisen in this court. The voting power of the stock is absolutely separated from its ownership for a term of years, so that the real owners of the property are during that time entirely divested of its management and control or of any participation therein. Our law contemplates that corporations shall be controlled by a majority of the stockholders acting through directors elected by them in person or by proxy, and it has been held that a by-law of a corporation which authorizes bondholders to vote for directors at stockholders' meetings is in violation of both the constitutional and statutory provisions requiring directors to be elected by a majority of the shares of stock of the corporation. The power to vote for directors can be exercised only by stockholders in person or by proxy, and they cannot be deprived or deprive themselves of this power. Stockholders cannot evade the duty imposed upon

them by law of using their power as stockholders for the welfare of the corporation and the general interest of its stockholders. A stockholder may refuse to exercise his right to vote and participate in stockholders' meetings but he cannot deprive himself of the power to do so.

A stockholder may ordinarily withdraw from a combination to control the majority of the stock of a corporation and a contract not to transfer his shares to the opposition or vote against the combination, although it is expressly agreed that the contract shall be irrevocable. On general principles, the right to vote on stock cannot be separated from the ownership in such sense that the elective franchise shall be in one man and the entire beneficial interest in another, nor to any extent unless the circumstances take the case out of the general rule. It matters not that the end is beneficial and the motive good, because it is not always possible to ascertain objects and motives and if such a severance were permissible it might be abused.

While the pooling of stock for the purpose of electing directors and officers and controlling the management and business of the corporation is not necessarily illegal, an agreement the purpose and effect of which are to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders or by a minority of its own stockholders, is invalid.

The principle is that the holders of the majority of the shares of stock in a corporation may control its management, and every person who becomes an owner of stock has a right to believe that the corporation will, and to insist that it shall, be managed by the majority; that the power to vote is inherently attached to and inseparable from the real ownership of each share, and can only be delegated by proxy, with power of revocation; that each stockholder must be free to cast his vote, whether by himself or by proxy for the best interest of the corporation, and that each stockholder has the right to demand that every other stockholder, if he desires to do so, shall have the right to exercise at each annual meeting his own judgment as to the best interest of all the stockholders, untrammelled by dictation and unfettered by the obligation of any contract.

II. Voting Stock Held by Corporation.

American Railway-Frog Co. v. Haven. 101 Mass. 398.

A stockholder seeks a declaration that certain persons were elected officers of the Company. The defendants, also stockholders, deny the election of these persons on the ground that Clark, who held 400 shares in trust for the corporation, had voted this stock against them and that they had consequently not received a majority of the votes. The plaintiff contends that Clark could not vote stock held by him for the corporation.

Held, that stock belonging to a corporation, whether held in trust for it or not, may not be voted.

Ames, J.

The case finds that the capital stock was divided into two thousand shares, all of which were properly issued to the original stockholders; and that some time afterwards four hundred of these shares were transferred by some of the stockholders to Aaron N. Clark "to hold for the benefit of the corporation." If these transfers had been made directly to the corporation, without the intervention of a trustee, it would hardly be contended that it would thereby become entitled to vote at a meeting of stockholders. A corporation cannot literally be one of its own stockholders in the full sense of that term. Such a transfer might not operate as a mere surrender or cancellation of stock, unless so intended. It would not diminish the amount of the capital, not necessarily reduce the number of shares. The corporation might perhaps receive such a transfer, and hold the stock so conveyed to it, for the purpose of reissue to new subscribers or purchasers. By the terms of the transfer, Clark holds "for the benefit of the corporation," and of course subject to its order. This is the extent of his trust. Nothing in the nature of it makes it necessary that he should vote, as the holder of those shares. There is no apparent reason why he, not being beneficially or practically the owner of them, should be endowed with the privilege of controlling four hundred votes according to his own judgment or pleasure, especially when it is taken into consideration that the corporation for which he holds them has no right of voting in any event. It is easy to see that any such privilege would not only be unreasonable and unfair, but might lead to great abuses. The position of these shares, in our judgment, is the same, to all intents and purposes, so far as the right of voting upon them is concerned, as if they were held directly by the corporation itself; and until they are sold and transferred by its authority, the right of voting upon them is suspended. It follows then, that at the annual meeting in question, the votes on these four hundred shares ought not to have been received or counted; that the whole number of competent and legal votes was fifteen hundred and thirty three, and no more; that Cuntz and his five associates received a clear majority of these votes; and that they were duly elected to the offices claimed for them respectively in the petition.

12. Control of One Corporation by Another.

Memphis & Charleston Railroad Co. v. Woods. 88 Ala. 630.

Woods and others, stockholders of the Memphis & Charleston Railroad Company, seek to enjoin the East Tennessee, Virginia & Georgia Railroad Company from voting stock held by it, a ma-

jority of all the stock of the Memphis & Charleston Railroad Company, at an election of directors. The bill alleges mismanagement of the business affairs of the Memphis & Charleston Railroad Company by officers elected by the votes of the other corporation. This mismanagement consisted of incurring unnecessary expenses, making improper application of earnings, and increasing the profits of the East Tennessee Company at the expense of the Memphis & Charleston Railroad Company.

Held, that when one corporation controls another through holding its stock, it must exercise its power for the benefit of the controlled corporation.

Stone, C. J.

Can one corporation acquire a majority of the stock of another corporation, and, by the exercise of the voting power the majority of stock confers, govern and control the management of such corporation? This question, in its naked form, has rarely been presented to the courts, although it is generally known that such transactions are not infrequent.

The right of a corporation to invest in the shares of another company cannot be implied merely because both companies are engaged in a similar kind of business. A corporation must carry on its business by its own agents, and not through the agency of another corporation.

Although directors of a pecuniary corporation may not be trustees in the technical sense of that term, they are under the same restraints, and labor under the same disabilities, which rest on trustees proper, so far as questions raised by the present bill are concerned. When personal interest antagonizes the disinterestedness and impartiality which the law, as well as morality, exacts in the exercise of fiduciary trusts, this is, *per se*, a disqualification, not by reason of any abuse committed, but in fear that weak human nature will yield to temptation. Justice Field, speaking of the conflict between duty and interest, says: "Constituted as humanity is, in the majority of cases duty would be overborne in the struggle."

We hold that it is equally against public policy, and against that sound rule which disables trustees, or *quasi*-trustees, to act when their duty and interest conflict, that the East Tennessee, Virginia & Georgia Company should be allowed to vote its majority stock, in matters pertaining to the management and control of the Memphis & Charleston Company.

We confine our ruling to cases like this one, where a conflict of interest may arise, in the matter of expenditures and their apportionment, in the division of patronage, or of earnings, and to rivalships between different companies having substantially the same field of operation, or where the profits of one enterprise will naturally be enhanced by the diminution of those of the other. There may be

other cases to which the rule will apply, but we decline to consider them now.

13. Corporations with Common Directors.

O'Conner Mining & Manufacturing Co. v. Coosa Furnace Co.
95 Ala. 614.

The O'Conner Company, a creditor of the Coosa Furnace Company, seeks to set aside transfers of property made by the Coosa Furnace Company to other corporations whose directors were likewise directors of the Coosa Furnace Company.

Held, that the mere fact that two corporations have common directors will not justify a creditor in setting aside conveyances made between them.

Walker, J.

The directors of a business corporation are its agents. Though they may not be trustees in the technical sense, yet they exercise functions of a fiduciary character. Their position implies that confidence is reposed in them. The duties which a director assumes to the corporation and to the stockholders thereof disqualifies him from binding the corporation in a transaction in which he is adversely interested. He cannot at the same time act for himself and for his principal, without the full knowledge and free consent of the principal. A person who is agent for two parties cannot, in the absence of express authority from each, represent them both in a transaction in which they have contrary interests. This rule is based upon the same reason as the rule which prohibits an agent from representing his principal, when his personal interests are opposed to his duty. The principal stipulates for the judgment and skill of his agent, and the latter has no authority to act, when he is not in a position to give the principal the benefits of his best endeavors. It follows, therefore, that the directors, or other agents of the corporation, have no implied authority to bind the company by making a contract with another corporation which they also represent. If the same persons as directors of two different companies represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair and open it may be shown to be.

But the duty which disqualifies the directors from binding the corporation by a transaction in which they have an adverse interest, is one owing to the corporation which they represent, and to the stockholders thereof. A principal may consent to be bound by a

contract made for him by an agent who, at the same time, represented an interest adverse to that of the principal. A *cestui que trust* may elect to confirm a transaction which he could have repudiated on the ground that the trustee had an interest in the matter not consistent with his trust relation. In like manner, dealings between corporations, represented by the same persons as directors, may be accepted as binding by each corporation and the stockholders thereof. The general rule is, that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding, if acquiesced in by the corporations and their stockholders.

The directors of a corporation, in the transaction of its business and the disposition of its property, do not stand in any such relation to the general creditors of the corporation as they occupy to the corporation itself and to its stockholders. They are not the agents of such creditors, nor can they usually be regarded as trustees acting in their behalf. The creditors are not entitled to disaffirm a transfer of the property of the corporation, made by its directors or other agents, merely because the corporation itself or the stockholders could have done so. When a disposition of the property of a corporation is assailed by its creditors, they are not clothed with the right of the corporation or of its stockholders to set aside the transaction, regardless of its fairness or unfairness, on the ground that it was entered into by representatives of the corporation who had put themselves in a relation antagonistic to the interests of their principal. The right of the creditor to impeach the transaction depends upon its fraudulent character. The question in [this] case is, was the transaction which is complained of entered into with the intent to hinder, delay or defraud creditors? Was the property fraudulently transferred or conveyed? The mere fact that the corporation, in disposing of its property, dealt with persons who at the same time were charged with the duty of representing its interests, does not, by itself, render the transaction fraudulent.

Where the property of a corporation is transferred to another corporation represented by the same directors, the fact of such relationship is a circumstance well calculated to arouse suspicion, and calls for a rigid and severe scrutiny in the examination of such transaction when it is assailed by a creditor. When such a relationship is shown to exist between the contracting parties, clearer and fuller proof must be given of a valuable and adequate consideration, and of the good faith of the parties, than would be required if the transferee or grantee had been a stranger. When, however, such examination is made, and such proof is forthcoming, and the result is that no fraud or unfair dealing is shown, and it appears that the transaction was not vitiated by any infirmity of which a creditor has the right to complain, then the transaction must stand, and it is as valid, as against the creditor, as if the corporation had dealt with a stranger, who was not involved in any way with the corporate representatives.

14. Transactions Requiring Sanction of Stockholders.

Massachusetts Acts and Resolves of 1903. Chapter 437.

Section 40. Every corporation may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize an increase or a reduction of its capital stock and determine the terms and manner of the disposition of such increased stock, may authorize a change of the location of its principal office or place of business in this commonwealth or a change of the par value of the shares of its capital stock, or may authorize proceedings for its dissolution under the provisions of section fifty one.

It may, at a meeting duly called for the purpose, by the vote of two-thirds of all its stock, or, if two or more classes of stock have been issued, of two-thirds of each class of stock outstanding and entitled to vote, or by a larger vote if the agreement of association so requires, change its corporate name, the nature of its business, the classes of its capital stock subsequently to be issued and their voting power, or make any other lawful amendment or alteration in its agreement of association or articles of organization, or sell, lease or exchange all its property and assets, including its good will and its corporate franchise, upon such terms and conditions as it deems expedient.

B. Authority and Duties of Officers.

1. In General.

Beach v. Palisade Realty & Amusement Co. 86 N. J. L. 238.

Beach, receiver of the Columbia Real Estate Company, sues the Amusement Company upon an agreement signed by its second vice-president, to purchase a certain amount of its own capital stock and bonds from the Real Estate Company. The contract was not authorized by the board of directors of the Amusement Company.

Held, that in the absence of estoppel, a corporation is not bound by the act of an officer which he is not authorized to perform and which is not usual to his office.

Trenchard, J.

Particular officers or agents of a corporation have such authority only as is expressly conferred upon them by the charter, by-laws, or resolution of the board of directors or of the stockholders, and

such as is implied because necessary or proper to enable them to perform the duties of their office.

The only authority expressly conferred upon the second vice-president was that contained in the resolution of the board of directors by which such office was created, namely, "to sign contracts in connection with the improvement, operation and maintenance of the Palisades Park as an amusement enterprise." Clearly that conferred no power to make a contract on behalf of the corporation for the purchase of the capital stock and bonds of the corporation, nor could such power be implied on the theory that it was necessary to enable such officer to perform the duties of his office.

Of course, if a corporation holds an officer out, or allows him to appear as having authority not usual to such an office, it will be bound by acts done by him within the scope of his apparent authority. But that is not this case. There is no evidence that the second vice-president was held out, or allowed to appear as having authority to purchase the company's own capital stock and bonds. In point of fact the propriety of purchasing its own capital stock and bonds was never considered by the company, nor was it ever attempted by an officer except in this instance.

2. Duty of Directors to Corporation.

Hun v. Cary. 82 N. Y. 65.

Hun, receiver of the Central Savings Bank, sues the defendants, who were trustees of the bank, for damages caused the bank by their misconduct as trustees arising out of improper investment of the bank's funds.

Held, that directors of a corporation owe it the duty of conducting its affairs with the prudence ordinarily exercised by men of common prudence in conducting their own affairs.

Earl, J.

The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a wilful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot

be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence and it is a gross breach of duty—*crassa negligentia*—not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank entrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning—as something nearly approaching fraud or bad faith—I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees, entrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully up-

holding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case. I think the question in all such cases should and must necessarily be, whether they (directors) have omitted that care which men of common prudence take of their own concerns. To require more, would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less, would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only—which is very little short of fraud itself.

3. Duty of Officer to Account for Secret Profits.

McClure v. Law. 161 N. Y. 78.

McClure, receiver of the Life Union, sues Law, a former president and director, to recover the sum of \$3,000 paid to him by Robertson and Levy for securing the resignation of himself and other directors and the election in their stead of parties indicated by Robertson and Levy.

Held, that a director of a corporation is bound to account for profits improperly made by him in relation to the business of the corporation of which he is a director.

Haight, J.

The question is presented, whether the defendant is bound to account for the money received from Levy for the transfer to him and his associates of the management and control of the Life Union, together with its property and effects. The learned Appellate Division has treated this transaction as a bribe paid to the directors of the Life Union by Levy, and reached the conclusion that the money did not belong to the corporation. We think, however, that the law does not permit the defendant to avail himself of his own wrong as a defense to this action. As president and director of the Life Union he was bound to account to that association for all moneys that came into his hands by virtue of his official acts, and he cannot be permitted to shield himself from such liability under the claim that his acts were illegal and unauthorized. As an officer he had the right to resign, but the money was not paid to him for his resignation. It was paid over under condition that he procure Levy and his friends to be elected directors and given the control and management, together with the property and effects of the corporation. The election of directors and the transfer of the management and property of the corporation were official acts, and whatever money he received from such official acts were moneys de-

rived by virtue of his office for which we think he should account.

It is a well established principle of law that a director commits a breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him.

4. Relation Between Officer and Stockholder.

Hooker v. The Midland Steel Co. 215 Ill. 444.

Hooker, a stockholder in the Midland Steel Company, sold stock to Beatty, the president of the Company, at a price which he contends was less than its true value, induced, as he claims, by misleading representations of Beatty. Beatty offered to return Hooker's stock to him, but Hooker brings this bill to determine the true financial status of the corporation and to adjust the stock sale in accordance with what should appear to be the true condition of the corporation's affairs.

Held, that an officer of a corporation is not in a fiduciary relationship to an individual stockholder.

Cartwright, J.:

The bill averred that Beatty did not make a full and frank disclosure of all the facts within his knowledge affecting the value of complainant's stock or which would enable complainant to determine whether it would be best to sell the stock at the price offered or not. It is contended that Beatty, being the president and director of the Midland Steel Company, was a trustee for the complainant as a stockholder, and was therefore in a fiduciary and confidential relation requiring him to disclose all such facts within his knowledge, and that he could not retain a benefit acquired by a breach of that duty or use knowledge in his possession to obtain a bargain from the complainant. The management of the business and property of a corporation is entrusted to its officers, and they are empowered to act for the whole body of stockholders. They therefore occupy the position of trustees for the stockholders as a body in respect to such business and property, and cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees. A director, however, does not sustain that relation to an individual stockholder with respect to his stock, over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. In the absence of actual fraud, such a purchase will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock. The rule as to a director is as follows: "There is no confidential relation between him and a stockholder, so far as a sale of the stock between them

is concerned and so long as he remains silent and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud." Beatty did not sustain such a trust relation to the complainant, as an individual stockholder, as would prevent him, in the absence of actual fraud, from purchasing the stock.

5. Right of Directors to Contract with Corporation.

The United States Steel Corporation v. Hodge. 64 N. J. E. 807.

Hodge, a stockholder of the United States Steel Corporation, seeks to restrain it from executing a mortgage pursuant to resolutions of the stockholders providing for the reduction of two hundred million dollars of its preferred stock and the retirement thereof. Hodge attacks the transaction on the ground that the directors of the corporation were members of the banking syndicate which had contracted with the corporation to finance the proposed reduction.

Held, that directors of a corporation may make such contracts with it as are known to the stockholders and ratified by them.

Van Syckel, J.

The insistence that the votes of members of the syndicate, who were also directors of the company, cannot be lawfully counted in order to constitute a two-thirds vote in favor of the resolution to reduce the amount of preferred stock, is without any foundation in reason or in law.

They voted upon that resolution not as directors, not in their fiduciary capacity, but solely in the right of the shares of stock held by them. A most valuable privilege, which attaches to the ownership of stock in a corporation, is the right to vote upon it at any meeting of stockholders. As to that resolution, considered by itself, as stockholders, they owed no greater duty to their co-stockholders than those stockholders owed to them.

Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right; nor can it be limited or circumscribed by the fact that they occupy the position of directors in the company.

With respect to the bankers' contract a very different rule applies.

The rule that directors cannot lawfully enter into a contract, in the benefit of which even one of their number participates without the knowledge and consent of the stockholders, is so firmly entrenched in our jurisprudence that it is not open to debate.

The rule is imbedded in our jurisprudence, and it cannot be too strongly stated or too rigorously applied. But in the cases cited the contract was made by the trustee without the knowledge

or consent of the *cestui que trust* and without subsequent ratification or adoption by which the vice in it could be cured.

The object of the rule is to prevent directors from secretly using their fiduciary position for their own emolument, and not to impair the right of stockholders to enter into any lawful engagement with a full disclosure of the facts.

It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders, and not void *per se*.

In this case not only [in] the bankers' contract made with J. P. Morgan & Company and approved by a two-thirds vote of the shareholders, with knowledge that J. P. Morgan was one of the directors of the steel corporation, a fact which they may be presumed to have known, but also in the circular letter accompanying the call of the stockholders' meeting to be held on the 19th of May, it was expressly stated as follows:

"To further the success of the plan there has been formed a syndicate, including some directors, which will receive four-fifths of the four per cent. compensation to be paid under the contract with Messrs. J. P. Morgan & Company, mentioned in the notice of stockholders' meeting."

The stockholders of the company are therefore chargeable with express notice that some directors were interested in the bankers' contract, and by reasonable inquiry at the meeting of May 19th, they could have ascertained the names and number of such directors.

6. Powers of President.

Mausert v. Feigenspan. 68 N. J. E. 671.

By a lease under seal, the Feigenspan Corporation & Brewing Company leased certain premises to Mausert, a saloonkeeper, under certain conditions relating to the brand of liquors to be sold upon the premises. Later, the president of the Feigenspan Company gave Mausert permission to sell beer brewed by other companies. Mausert now seeks to obtain a lease containing the modified agreement made with him by the president.

Held, that the president of a corporation has no implied power to modify contracts entered into by the corporation itself.

Gummere, C. J.

We concur in the view that the agreement of the president of the company to modify the provision in the contract relating to the sale of liquor (if such agreement was made by him) did not bind the respondent. No attempt was made to show any express authority conferred upon him for this purpose by the board of directors, and he had no power *virtute officii* to alter the provisions of a formal agreement under seal entered into by the corporation itself. The

act of the president of a corporation, unless it is shown to pertain to his official duty, or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. His powers over its business and property are strictly the powers of an agent, delegated to him by the directors, who are the managers of the corporation, and the persons in whom the control of its business and property is vested. He may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. To this extent, by virtue of his office, he is the agent of the corporation, but beyond this, his official position gives him no more control over its property, funds or business, than any other director. Any act done by him which is outside the scope of the powers which inhere in his office will not bind the corporation, unless it is shown that authority was conferred upon him for the purpose by the directors, either expressly or by their consent and acquiescence in permitting him to assume the direction and control of the business of the company. As has already been said, no express power was shown to have been conferred upon the president of the respondent company to alter its formal agreement, executed by it under its corporate seal, and it cannot be inferred from the testimony that such power had been conferred upon him inferentially, by his assumption of the direction and control of the business of the corporation, with the consent and acquiescence of the directors.

7. Powers of Treasurer.

Jacobus v. Jamestown Mantel Co. 211 N. Y. 154.

Jacobus, assignee of a note of the Jamestown Mantel Company, signed by Turner as treasurer, sues the corporation thereon. The note was made by Turner for the accommodation of Welch, who discounted it. The corporation defends on the ground that its treasurer has no authority to make accommodation paper and on the further ground that no estoppel arises if such paper is in fact made by him.

Held, that the treasurer of a corporation has no implied power to sign notes.

Chase, J.

A manufacturing corporation has no power to make or indorse notes for the accommodation of others. One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority. Notwithstanding the general rule stated, a corporation is bound if it makes or indorses commercial paper for accommodation of another in respect to a bona fide holder who discounts it before maturity on the faith of its being a business

paper. Decisions are based upon the assumption that the officers making or indorsing a promissory note had authority from the corporation to make and indorse such notes in the ordinary course of its business. Such decisions do not apply to a case where the officers purporting to act for a corporation do not have authority to sign commercial paper in the ordinary course of its business. A treasurer of a manufacturing corporation has no power to make promissory notes in its name unless such power is expressly given to such officer by the by-laws of the corporation or by resolution of its board of directors. No presumption existed that the defendant's treasurer had power to make or indorse business paper. It was necessary, therefore, for the plaintiff to show that the treasurer had authority to execute promissory notes in the name of the corporation in the ordinary course of its business, or that the defendant was estopped from denying such authority.

If the defendant had, prior to August, 1907, in the usual course of its business permitted its treasurer from time to time to make promissory notes in its name which it ratified and approved by paying them, and knowledge of such acts had come to the trust company, and it had relied upon such acts as showing authority in the defendant's treasurer to make promissory notes in its name in taking the note in controversy, a question of estoppel would have arisen as against the defendant in this action.

It is essential for one claiming that another is equitably estopped from denying liability because of his previous acts and conduct to show that he was influenced by and relied upon such acts and conduct in making the promise or performing the act upon which the liability is asserted. The defendant is not estopped from denying its liability in this case. If the president of the trust company had made inquiry in regard to the practice of the defendant in making promissory notes and the authority of its treasurer to sign its name to such notes, and he had ascertained all the facts presented by the record, there would have remained a question of fact as to whether the inquiry was a reasonable one, and whether the facts shown were sufficient to warrant the action of the trust company in discounting the note in question.

8. Estoppel to Deny Power of Officer.

St. Clair v. Rutledge. 115 Wis. 583.

Bowen, president of the Peerless Iron & Land Company, acting in accordance with a vote of the directors, sold to Rutledge, the defendant, timber privileges on land belonging to the corporation. Without such a vote, he extended the time for removal to a date later than that upon which the corporation conveyed the land in question to the plaintiff, who seeks to secure complete title to the land.

Held, that a corporation is bound by the exercise of the ostensible powers of its officers.

Marshall, J.

Was the act of the president of the Peerless Iron & Land Company, in attempting to extend respondent's privilege to cut and remove the timber, *ultra vires*? That is the sole question for decision. It is useless to spend time endeavoring to test the matter by the law respecting what a president of a corporation cannot do by virtue of his office; that it gives him no right to make contracts binding on his company; that authority to that end in fact can only be conferred upon him by the articles of organization or some by-law or resolution passed by the board of directors, and that all persons dealing with a corporation are bound to take notice of the limitation upon its authority and notice of its articles of organization and by-laws. If the evidence warrants the finding that Bowen, for years prior to the making of the extension, was held out by the corporation as its general agent, and as having authority to do such acts as the one in question, it is bound thereby to the same extent as if authority were conferred in the most formal manner. That an artificial person is estopped from denying that its agents possess all the authority which it gives them the appearance of, the same as a natural person, is just as well established as the principle that the president of a corporation is not, *ex officio*, its general agent or possessed of authority to make contracts binding upon it. A general agent in fact of a corporation may be and commonly is its president, and when such is the case his official position is by no means a limitation upon his powers as such agent. As has often been said, intolerable mischief would result from requiring every person, at his peril, in dealing with the president of a corporation in a matter outside the scope of his duties as such, to first examine its records. The business world is not subject to any such dangers. The application of the doctrine of estoppel by courts has kept pace with the rapid development of corporate enterprise, so that, while ancient rules regarding limits upon powers of officers of corporations have not been abrogated, they are conclusively presumed to have been complied with or compliance to have been waived by the corporation, where justice so requires.

The idea that every time a person deals with the officer of a corporation or person assuming to act in its behalf, he must under all circumstances take his chances on whether such officer or person has been specially authorized in regard to the matter, has no place in the law in our day. Proof of apparent authority of a corporate officer to contract in its behalf *prima facie* establishes actual authority so to do, and mere want of authority in fact will not relieve a corporation from the burden of a contract made in reasonable reliance upon such appearance of authority. What will sufficiently evidence apparent authority of the president of a corporation to make a contract in its name must be considered with reference to the character of

the business involved, common knowledge of the manner in which corporate business is usually carried on, and many other circumstances—significant among them the fact that it has come to pass that the president of a business corporation almost universally exercises the powers of a general agent for his company. One takes the obligation of a corporation, executed by its president in the regular course of business, not knowing any person in the transaction except such president, without a thought of any necessity of making an inquiry as to whether he has been specially authorized in the matter or possesses power in the premises under any general law of the company. Presidents of corporations well-nigh universally exercise the power of a general agent, either by special or general authority regularly conferred, or by the tacit consent of the corporation, given by its governing board of directors, the public not knowing or stopping in business transactions to inquire how it was conferred. We are safe in saying that the circumstances where such is not the case are rare exceptions to the general course of corporate business. Such being the case, as a matter of common knowledge, if a corporation permits its president, for any considerable length of time, so to act, and its board of directors customarily omits to hold meetings for the purpose of directing the affairs of the corporation, apparently leaving its business affairs wholly to be looked after by its president, and specially, or by not acting affirmatively one way or the other, ratifies his acts, his authority to do the things which, by such conduct, he is apparently authorized to do, is just as binding upon the corporation as if the power were conferred in the most formal manner.

C. Dissolution.

1. How Dissolution is Effected.

The Boston Glass Manufactory v. Langdon. 24 Pick. (Mass.) 49.

The plaintiff corporation sues on a promissory note given by the defendant, who denies the existence of the corporation on the ground that it has made an assignment for the benefit of creditors.

Held, that a corporation is not dissolved by making an assignment for the benefit of creditors.

Morton, J.

The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on corporations describe four methods in which they may be dissolved. It is said that private corporations may lose their legal existence by the act of the legislature; by the

death of all the members; by a forfeiture of their franchise; and by a surrender of their charters. No other mode of dissolution is anywhere mentioned or alluded to.

In England, where the parliament is said to be omnipotent and where in fact there is no constitutional restraint upon their action, but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the legislature. But if they possess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legislative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it cannot go, it has become a question of some difficulty to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiff's charter, it will not be useful further to discuss this branch of the subject.

As all the original stockholders are not deceased, the corporation cannot be dissolved for the want of members to sustain and exercise the corporate powers. Besides, this mode of dissolution cannot apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation as long as it may exist.

Although a corporation may forfeit its charter by an abuse or misuse of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal. Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to this effect be passed, they will continue their corporate existence.

Charters are in many respects compacts between the government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal solemn act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation.

2. Power of Majority to Dissolve.

Bowditch v. Jackson Co. 76 N. H. 351.

Bowditch and other minority stockholders of the Jackson Company seek to enjoin a sale of its assets to the Nashua Manufacturing Company. The question arises whether a majority of the stockholders have a right to sell the corporate assets, and consequently dissolve the Company against the protest of the minority.

Held, that a corporation may be dissolved by majority vote if the majority act for the interest of the corporation.

Peaslee, J.

The main question in this case is whether a going business corporation can be closed out and dissolved upon the motion of the majority of its stockholders and against the protest of the minority. The question is a new one in this state, although it has frequently been considered (both in cases where it was necessarily involved and those where it was not) by the courts in other states. The decisions and *dicta* are conflicting and are quite evenly divided.

Much has been said in the cases upholding the right of the minority to prevent a sale and dissolution, concerning the protection of their rights and saving their property from pillage by the majority. Just how the majority, which sells its own property at the same time and for the same price it sells that of the minority, gains an advantage over the latter is not readily apparent. Cases might be supposed, and undoubtedly occur, where the majority do obtain some undue advantage from the sale. No one contends that such a sale is valid. But because the power of the majority may be abused, it does not follow that it does not exist. If such a conclusion were to be drawn, minorities would always rule. The plain common-sense of the matter is that this is a business venture, to be carried on as such so long as it appears to be good business judgment to do so. When the time comes that a majority in interest believe that their affairs should be wound up and the proceeds distributed, the rational rule is that this should be done. And since the question here is of a business nature, and the limitations of the power of the majority are fixed by the understanding of the business men who made the original compact, business considerations have more than ordinary weight in determining what the contract was.

It is admitted on all sides that the majority may sell out if the corporation is insolvent. If insolvency is imminent, action may be taken. And the same is true if it is imprudent to continue. One reason only is given why the power exists in these cases; it is reasonable to suppose that such authority was contemplated, because this is what sound business judgment dictates should be done. The difference between these cases and the present one is of degree only, not of kind.

If the majority may sell to prevent greater losses, why may they

not also sell to make greater gains? Bearing in mind that this is purely a business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case, the sale is made because it is of advantage to the stockholders. Whether the profit to be made is a reasonable one, must be a relative matter. Three per cent when others make two might be reasonable; but three per cent when a sale could be made which would yield the stockholder ten could hardly be thought an investment a reasonable person would retain. The loss to the stockholder by a failure to sell out on a basis which would yield him ten per cent instead of the three he is receiving is in fact much greater than it would be if a concern went on neither making nor losing when the investment would earn four per cent elsewhere. It does not seem reasonable that the majority should have power to make a sale in the latter case, and not in the former. In neither case would the sale prevent positive loss, but in each it would result in positive gain. And the question is one of future prospects. Its decision requires the exercise of business judgment, sagacity, and power to forecast coming events. It is not an issue appropriate for trial and decision in courts, but rather one to be settled by the judgment of the men conducting the business in question. In a limited sense, the majority act as trustees for all the stockholders. When their acts are impugned by the minority, it is not the function of the court to set its judgment against theirs in settling the wisdom or policy of proposed action. By the contract of association, all questions of this nature were committed to the majority for final decision.

3. Continuance after Dissolution.

Friendship Telephone Co. v. Newark Telephone Co. 88 N. J. E. 562.

The Newark Telephone Company's charter expired in 1915, and McCarter was appointed receiver. To wind up its affairs, he sold the property to the Friendship Telephone Company. The city of Newark attacks this conveyance on the ground that the court had no power to direct a sale after the termination of the charter.

Held, that by statute, a corporation exists after the termination of its charter for purposes of settling its affairs.

Trenchard, J.

Under section 53 of the Corporation Act, all corporations, whether they expire by their own limitation or be otherwise dissolved, are continued bodies corporate for two purposes—(1) to prosecute and defend suits, and (2) to enable them "to settle and close their affairs, to dispose of and convey their property and to divide their capital,

but not for the purpose of continuing the business for which they were established."

By section 54, upon the dissolution of a corporation, its directors are continued as trustees, "with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and divide the moneys and other property among the stockholders, after paying its debts, so far as such moneys and property shall enable them."

The directors are given power to prescribe the terms and conditions of the sale of the property, and to sell all or any part for cash, or partly on credit, and to take mortgages and bonds for part of the purchase price for all or any part of the property.

It seems to be contended by the city that the company's physical property was forfeited to the city by reason of the discontinuance of its business upon the expiration of its charter. Not so. The discontinuance of the telephone service was the statutory consequence of the expiration of the charter and was not the affirmative act of the corporation. Upon the expiration of its charter the statute appropriated its property in payment of its debts and for distribution to its stockholders in a winding up proceeding.

4. Effect of Dissolution on Corporate Property.

Richards v. Northwestern Coal & Mining Co. 221 Mo. 149.

Richards made a deed of coal underlying property owned by him to the Central Coal & Mining Company, through whose assignee in bankruptcy the Northwestern Coal & Mining Company holds. Richards' son, the plaintiff, contends that a portion of this land was not disposed of by the assignee in bankruptcy and that it reverted to Richards upon the expiration of the charter of the Central Coal & Mining Company without a previous conveyance.

Held, that upon termination of the charter of a corporation, its property does not revert to the grantor but is held by the directors for the benefit of stockholders.

The Court:

The great weight of authorities deny that upon the dissolution of a corporation, whether by expiration of its charter or otherwise, the title to its real estate reverts to the grantor, and most of them hold that if such doctrine ever existed, it is a relic of barbarism and is now not recognized as the law.

After the statement of the doctrine in Angell & Ames on Corporations, that at common law, after the death of a corporation, all debts due to and from it are totally extinguished, the author adds, that "the rule of the common law in relation to the effect of dissolution upon the property and debts of a corporation has in fact become obsolete and odious. Practically it has never been applied in England

to insolvent or dissolved moneyed corporations, and in this country its unjust operation upon the rights of both creditors and stockholders of this class of corporations is almost invariably arrested by general or special statute."

It was formerly believed to be the common law that upon the dissolution of a corporation all its assets belonged to the state, and all its debts were canceled, and that the creditors were not entitled to anything from the assets. This remarkable theory has been stated and restated in text-books and decisions of the courts for over one hundred years. It is found in Blackstone's Commentaries and in the old works of Kyd on Corporations and Grant on Corporations. The courts, however, while upholding the rule theoretically, have quite uniformly refused to apply such a doctrine, and have invented various theories, fictions and arguments for avoiding this supposed doctrine of the common law. Finally, in 1899, an English court denied that the common law ever countenanced such confiscation, and showed that in the seventeenth and eighteenth centuries, many corporations were dissolved, and that in not a single case was any such doctrine applied. It again may be said that, although the common law has its reproaches, this is not one of them. The American courts have always refused to follow the supposed common law rule on this subject.

5. Statutory Provisions Relative to Dissolution.

Massachusetts Acts and Resolves of 1903. Chapter 437.

Section 51. A corporation which desires to close its affairs may, unless otherwise provided in the agreement of association, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize a petition for its dissolution to be filed in the supreme judicial court or in the superior court setting forth in substance the grounds of the application; and the court, after notice to parties interested and a hearing, may decree a dissolution of the corporation. A corporation so dissolved shall be held to be extinct in all respects as if its corporate existence had expired by the limitation of its charter.

Section 52. Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it and of enabling it gradually to settle and close its affairs, to dispose of and convey its property and to divide its capital stock, but not for the purpose of continuing the business for which it was established.

Section 53. If the charter of a corporation expires or is annulled, or if the corporation is dissolved, or if a judgment has been recovered against it, and it has neglected, for thirty days after demand made on execution, to pay the amount due, with the officer's fees, or to exhibit to the officer real or personal property belonging to it and subject to be taken on execution, sufficient to satisfy the same, and the execution has been returned unsatisfied, the supreme judicial court or the superior court shall have jurisdiction in equity upon application of a creditor or stockholder to appoint one or more receivers to take charge of its estate and effects and to collect the debts and property due and belonging to it; with power to prosecute and defend suits in its name or otherwise, to appoint agents under them and to do all other acts which might be done by such corporation, if in being, which may be necessary for the final settlement of its unfinished business. The powers of such receivers may be continued as long as the court finds necessary for said purposes.

Section 54. The receivers shall pay all debts due from the corporation if the funds in their hands are sufficient therefor; and if they are not, they shall distribute them ratably among the creditors who prove their debts in the manner directed by any decree of the court for that purpose. If there is a balance remaining after the payment of debts, the receivers shall distribute and pay it to those who are justly entitled thereto as having been stockholders of the corporation, or their legal representatives.

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GLOSSARY

A

- abatement*, n. a reduction; *plea in abatement*, a pleading by the defendant setting forth matters of fact showing the writ or declaration to be defective or incorrect.
- ab initio*, Lat. phr. from the beginning.
- abrogate*, v. to abolish, repeal or destroy.
- ad infinitum*, Lat. phr. without limit.
- adjudication*, n. the giving of a judgment in a cause; also the judgment given.
- administrator*, n. a man appointed by the probate court to manage the estate of a deceased person, generally in the absence of testamentary disposition. fem., *administratrix*.
- admiralty*, n. that body of law administered in maritime affairs.
- ad valorem*, Lat. phr. according to value.
- æquali jure*, Lat. phr. with equal right.
- affidavit*, n. sworn statement.
- agister (or)*, n. one who takes animals to pasture for hire.
- allegation*, n. an assertion by a party to an action in his pleading therein.
- alter ego*, Lat. phr. other self.
- ancillary*, adj. auxiliary; aiding.
- animadversion*, n. censure.
- anomalous*, adj. unusual; not conforming to rule.
- antecedent*, n. that which goes before. adj. foregoing.
- a posteriori*, Lat. phr. proceeding by induction from the effect to the cause.
- apparent*, adj. obvious.
- appellant*, n. that party who takes an appeal from a judgment.
- appellate court*, n. phr. court by which appeals are heard.
- appellee*, n. that party against whom an appeal from a judgment is taken.
- a priori*, Lat. phr. proceeding by deduction from the cause to the effect.
- assets*, n. property applicable to the payment of obligations.
- assignee*, n. one to whom an assignment is made.
- assignment*, n. an act or instrument of transfer.
- assignor*, n. one who makes an assignment.

assumpsit, Lat. an action at law brought upon a promise not under seal.

assured, n. or v. insured.

autonomous, adj. self-governing.

aver, v. to allege.

averment, n. allegation.

avoidance, n. annulment by evasion.

B

bailee, n. party to whom personal property is delivered under a contract of bailment.

bailor, n. party who delivers personal property under a contract of bailment.

bailment, n. delivery of personal property to another for the execution of a special object or purpose.

bankrupt, n. one by or against whom a petition in bankruptcy has been filed; a person, generally insolvent, whose financial condition makes him liable to action by his creditors for the seizure and distribution among them of his property.

bankruptcy, n. the state or condition of one who is bankrupt.

barter, n. a contract by which parties exchange goods or commodities for other goods or commodities.

beneficiary, n. person entitled to the enjoyment of property of which another has the legal possession.

bilateral (contract), adj. a contract in which the obligation exists on both sides.

bill of lading, n. phr. the written evidence of a contract for the carriage or delivery of goods, issued by the carrier.

book account, n. phr. a statement of debits and credits between contracting parties, kept in a book.

bond, n. an instrument under seal conditioned upon the performance of or forbearance from an act.

breach (of contract), n. failure to fulfill the obligations of a contract.

brief, n. a summary of arguments and authorities presented to the court by counsel in the hearing of a case.

broker, n. an agent employed to make a bargain between buyer and seller.

by-laws, n. regulations adopted by a corporation or municipality for its government.

C

canon, n. a law or ordinance, generally of the church.

capital (of corporation), n. the aggregate of the sum subscribed

or paid in by shareholders to be used in the business of a corporation, as increased or decreased by subsequent operations.

capital stock, n. phr. that sum of money raised by subscriptions of stockholders of a corporation, or other property of a corporation, which is represented by shares.

casus, Lat. n. event or outcome; case.

casus fœderis, Lat. phr. contingency contemplated by an agreement.

cestui que trust, Lat. phr. the owner of a beneficial interest in property, legal title to which is in another.

chattel, n. article of personal property.

chose in action, n. phr. right to recover possession or damages by legal process; right to enforce a claim or demand by legal process.

civil law, n. phr. the Roman law and its derivatives.

civiliter mortuus, Lat. phr. dead in contemplation of the law.

claimant, n. person who makes a claim.

codicil, n. instrument supplementing the terms of a will.

coerce, v. compel.

coeval, adj. contemporaneous.

collateral, adj. existing side by side.

comity, n. deference with which one jurisdiction treats the acts of another.

common law, n. phr. that body of unwritten law which has its source in usages and customs of immemorial antiquity.

composition (with creditors), n. agreement between a debtor and his creditors for the discharge of their claims, generally at less than their face value.

concur, v. to agree.

concurrent, adj. co-existing; running along with.

conjunctive, adj. serving to unite.

consideration (of contract). the benefit to the promisor or the detriment to the promisee which gives binding force to the contract.

consign, v. to deliver goods to a carrier to be transported to a named individual.

consignee, n. one to whom goods are consigned.

consignment, n. act of consigning goods; also used to indicate the goods consigned.

consignor, n. one who consigns goods.

contravention, n. violation.

conversion, n. unauthorized act of dominion over personal property of another.

- conveyance*, n. an instrument under seal by which an estate in land is created.
- copartnership*, n. partnership.
- corporate*, adj. pertaining to a corporation.
- corpus*, Lat. n. body.
- co-surety*, n. joint surety.
- court of chancery*, n. phr. court of equity.
- court of equity*, n. phr. court administering the law of equity, as distinguished from the common law.
- covenant*, n. a promissory warranty contained in a sealed instrument.
- covert*, adj. protected; term used to describe the status of a married woman.
- coverture*, n. the status of a married woman.
- crassa negligentia*, Lat. phr. gross negligence.
- cum onere*, Lat. phr. with the burden.
- cumulative voting*, n. phr. system of voting by which the elector, having a number of votes equal to the number of officers to be chosen, is allowed to use all his votes for one person, or to distribute them as he sees fit.
- curtesy*, n. that life estate in lands of his late wife to which a surviving husband is entitled by the common law. The right formerly existed only in event that children were born of the marriage.

D

- damages*, n. pecuniary compensation for injury or loss.
- damnum absque injuria*, Lat. phr. wrong for which there is no legal redress. Literally, loss without legal injury.
- debitum*, Lat. n. debt; something owed.
- deceit*, n. technically, an action of tort for a fraudulent misrepresentation.
- declaration of trust*, n. phr. act or instrument whereby a trust is created.
- decd.*, n. instrument by which one person conveys an interest in land to another.
- de facto*, Lat. phr. in fact; actually.
- defamation*, n. slanderous or libelous statements injurious to reputation.
- default*, n. omission or failure to fulfill a duty.
- defeasible*, adj. subject to annulment.
- defendant*, n. party against whom an action is brought.
- defendant in error*, n. phr. party against whom an appeal is taken by writ of error, a technical method of removal to a higher court.

- dehors*, prep. outside; foreign to.
delectus personarum, Lat. phr. choice of persons.
delegate, v. to commit the management of an affair to another.
delivery, n. the act of transfer of a sealed or other instrument or property to another.
demise, v. to lease or convey. n. lease or conveyance, originally, to take effect after death; also a synonym for death.
detinue, n. a form of action for the recovery, in specie, of personal property from one who has acquired possession of it lawfully but retains it without right.
detriment, n. loss or harm.
devise, n. gift of real property by will.
dictum, Lat. n. statement. *obiter dictum*, Lat. phr. collateral statement; statement contained in an opinion which is not necessary to decision of the case.
dishonor, v. to decline to accept a bill of exchange or neglect to pay a negotiable instrument at maturity.
disjunctive, adj. in the alternative.
disseisin, n. dispossession.
dissolution, n. breaking up.
divestiture, n. termination; the taking away of a right or power.
dock warrant, n. certificate of ownership of goods, given by the owner of the dock on which they are stored.
doctrine of causation, n. phr. that theory whereby the law limits legal liability to proximate results.
domicile, n. that place where a person has or makes his home.
donee, n. one to whom a gift is made.
donor, n. one who makes a gift.
dormant, adj. sleeping; inactive.
dower, n. that life estate in lands of her late husband, to which a widow is entitled at common law.
draft, n. order for the payment of money.
drawee, n. person on whom an order for the payment of money is drawn.
drawer, n. person who draws an order for the payment of money.
duress, n. unlawful constraint whereby a person is forced to do an act against his will.

E

- earnest*, n. money given to bind a bargain.
eleemosynary, adj. charitable.
eminent domain, n. phr. the right of a sovereign to take private property for public use.

entity, n. that which has an independent existence.

equitable, adj. of or pertaining to equity.

equity, n. that system of law having its source in the rulings of the chancellors, and applying the legal principles evolved by them.

escrow, (*delivery in*), n. delivery to a third person to hold pending the occurrence of a contingency.

essence, n. that which is indispensable.

estoppel, n. a bar raised by the law on account of a person's prior conduct to preclude him from changing his legal position to the detriment of one who has rightfully relied on such prior conduct.

et al., Lat. phr. (abb. from *et alius*) and another.

ex, Lat. prep. out of, from.

ex æquo et bono, Lat. phr. in justice and fairness.

ex contractu, Lat. phr. arising from a contract.

execution, n. carrying into effect; also used to indicate an order of the court directing the enforcement of its judgment.

executor, n. a person named by the maker of a will and appointed by the probate court to carry out its provisions. fem., *executrix*.

ex facie, Lat. phr. apparent on the surface.

ex parte, Lat. phr. by or for one party only.

express, adj. explicit; not left to inference or implication.

ex turpi causa, Lat. phr. arising out of an illegal and iniquitous state of facts.

F

fee, n. absolute ownership (of land).

felony, n. crime punishable by death or imprisonment in state's prison.

feme sole, Nor. Fr. phr. unmarried woman.

fiduciary, n. person in a relationship of trust. adj. in the nature of a trust.

fi. fa. (*feri facias*), Lat. phr. writ of execution commanding a sheriff to levy upon property belonging to a judgment debtor.

foreign corporation, n. phr. corporation created by the law of another jurisdiction.

a fortiori, Lat. phr. all the more so; by a stronger reason.

franchise, n. a special privilege conferred by a governmental body upon an individual or corporation.

freehold, n. an estate in land in fee or for life.

functus officio, Lat. phr. having fulfilled the purpose.

futures, n. options, giving the holder a right to require delivery at a future time, no actual delivery being, as a rule, contemplated.

G

gaming, n. gambling.

good will, n. phr. the benefit accruing to an established business from the likelihood that customers will continue to resort thereto.

grant, n. transfer of title, generally to real property.

grantee, n. person to whom a grant is made.

grantor, n. person who makes a grant.

gratuity, n. gift.

guarantee, v. to promise to answer for the fulfilment of an obligation of another.

guaranty, n. promise to answer for the fulfilment of an obligation of another.

H

hypothecate, v. to make a contract of mortgage or pledge without delivery of the article mortgaged or pledged. n. hypothecation.

I

ignorantia legis neminem excusat, Lat. phr. ignorance of the law excuses no one.

ipso facto, Lat. phr. by the fact itself.

implead, v. to join as defendant in a legal action, generally criminal.

implied, adj. understood; not expressed.

impugn, v. to confute; to discredit.

inception, n. beginning.

incompetent, adj. unfit. n. *incompetency*.

incorporate, v. to form a corporation.

indemnify, v. to secure against loss or damage.

indemnity, n. compensation to one indemnified.

indicia, Lat. pl. n. indications.

indorsement, n. the act of a party in writing his name upon the back of a negotiable instrument, whereby the property therein is transferred to another. *indorsement*, (*accommodation*), the indorsement of a negotiable instrument by a third party for the purpose of lending his credit to a party thereto.

in hæc verba, Lat. phr. in these words.

injunction, n. order issuing from a court of equity requiring a person to do or refrain from doing a particular act.

in pais, (*act in pais*), Nor. Fr. an act which takes place without legal proceedings; a transaction which is neither a matter of record nor under seal.

in pari delicto, Lat. phr. equally in the wrong. *In pari delicto potior est conditio defendentis*, Lat. phr. where each party is equally at fault, the situation of the defendant is the stronger.

in personam, Lat. phr. against the person.

in re, Lat. phr. in the matter of.

in rem, Lat. phr. against the thing.

insolvency, n. the condition of one, the amount of whose liabilities exceeds the value of his assets.

instrument, n. legal document.

inter sese, Lat. phr. among themselves.

intestate, adj. leaving no will. n. a person who dies leaving no will.

in toto, Lat. phr. completely.

J

joint, adj. participated in by two or more as a unit.

joint and several, adj. phr. participated in by two or more, both as a unit and separately.

joint stock company, n. phr. a business organization, having in many respects the form of a corporation, but the legal effect of a partnership.

judgment, n. decision of a court.

judicial sale, n. phr. sale ordered and carried through under authority of a court.

jurisdiction, n. power to hear and determine.

jus disponendi, Lat. phr. right of disposal.

L

laches, n. omission; negligent omission to take appropriate action for the enforcement of one's rights.

latent defect, n. phr. defect not readily discoverable upon inspection.

lease, n. instrument under seal, transferring the right to possession of real or personal property, without transfer of the title.

lessee, n. one to whom a lease is made.

lessor, n. one who makes a lease.

letters testamentary, n. phr. the formal appointment of an executor by a probate court.

levy, n. the act of a sheriff in seizing property to satisfy an execution.

lex mercatoria, Lat. phr. the law merchant; that body of law founded upon the customs of the merchants in vogue during

the Middle Ages upon the Continent of Europe and in England.

lex loci rei sita, Lat. phr. law of the place where a thing is.

libel, n. written defamation; also a written statement of the plaintiff's case in divorce or admiralty proceedings.

license, n. permit granted by proper authority.

lien, n. a right to hold the property of another as security for the enforcement of a claim.

life estate, n. phr. an interest in real property, terminating at the death of the owner or another.

limited partnership, n. phr. form of partnership, authorized by statute, whereby the liability of the partners is limited.

locus pœnitentiæ, Lat. phr. opportunity for reconsideration.

locus sigillî, Lat. phr. the place of the seal.

M

mala fides, Lat. phr. bad faith.

malfeasance, n. wrongful or unjust doing of an act which the doer has no right to do.

malum in se, Lat. phr. act inherently wrong.

malum prohibitum, Lat. phr. act prohibited by statute. pl. *mala prohibita*.

mandamus (*writ of*). a writ ordering the doing of a ministerial act by the defendant.

mandate, n. contract by which the management of a business is committed to another.

mandatory, n. one to whom a mandate is given. adj. peremptory.

marital, adj. pertaining to the marriage relation.

market overt, n. phr. public market.

marshalling, part. ranking in order.

maxim, n. principle of law universally admitted.

merger, n. fusion of one right in another.

misfeasance, n. improper performance of an act which the doer may lawfully do.

moiety, n. half.

mortgage, n. a conveyance of real or personal property, whereby the legal title or, in some states, a lien thereon, is conveyed as security subject to avoidance upon performance of the condition named in the instrument.

mortgagee, n. one to whom a mortgage is given.

mortgagor, n. one who gives a mortgage.

mutuality, n. reciprocity of rights.

N

- negligence*, n. failure to exercise the care required by law under the circumstances.
- negotiability*, n. that quality of checks, bills of exchange and promissory notes which makes them transferable from one person to another by indorsement and delivery, or by delivery only.
- negotiable*, adj. having the attribute of negotiability.
- negotium*, Lat. n. business.
- net profit*, n. phr. gain accruing on investment, after deduction of losses and expenses.
- nisi prius (court)*, Lat. phr. court of first instance.
- nominal value*, n. phr. artificial value; value existing in name only.
- nonfeasance*, n. failure to perform an act.
- non-joinder*, n. omission to join a person as a party.
- nonperformance*, n. failure to perform.
- notary*, n. a public officer whose function it is to attest certain classes of legal documents.
- novation*, n. substitution of a new contractual obligation for another.
- noxal action*, n. phr. action for damages done by slaves or irrational animals.
- nudum pactum*, Lat. phr. an undertaking without consideration.
- nugatory*, adj. ineffectual.

O

- obiter dictum*, see dictum.
- obligation*, n. duty to do or to forbear from doing.
- obligee*, n. one in favor of whom an obligation is contracted.
- obligor*, n. one upon whom an obligation rests.
- offeree*, n. one to whom an offer is made.
- offeror*, n. one who makes an offer.
- omnis ratihabitio retrotrahitur*, Lat. phr. every ratification relates back.
- option*, n. right to purchase or sell at the election of the holder of the option.
- ostensible*, adj. apparent.
- overt*, adj. open.

P

- pari passu*, Lat. phr. with equal step; equally.
- parity*, n. equality.
- particeps criminis*, Lat. phr. accessory to a crime.

- par value*, n. phr. face value (of a security).
patent defect, n. phr. defect readily discoverable upon inspection.
penal, adj. pertaining to punishment.
perjury, n. the giving of wilfully false testimony under oath.
per my et per tout, Nor. Fr. phr. by the half and by the whole; the tenure of joint tenants.
perpetuity, (*rule against*), n. phr. that provision of the law which requires an estate to vest within the duration of a life in being and twenty-one years thereafter.
per se, Lat. phr. by itself; actually.
plaintiff in error, n. phr. one who takes an appeal by writ of error. See *defendant in error*.
plat, n. map.
pleading, n. formal statement of allegations filed in an action.
pooling, n. an agreement between competitors for the joint operation of their business, or for a pro rata distribution of their profits.
positive law, n. phr. law authoritatively imposed.
precedent, n. adjudication having the force of authority in similar cases. adj. going before. *condition precedent*, n. phr. a condition upon the occurrence of which an obligation becomes enforceable.
preference, n. advantage which one creditor obtains over another creditor in connection with the satisfaction of his claims from the property of a bankrupt.
privity, n. one having a mutual interest in the same subject matter with another. adj., having a mutual interest.
privity, n. mutuality of interest.
probate, adj. pertaining to the administration of the estate or will of a deceased person. *probate court*, n. phr. court having jurisdiction over probate matters.
pro rata, Lat. phr. proportionately.
prosecution, n. proceedings brought by the sovereign for punishment of a crime.
pro tanto, Lat. phr. to that extent.

Q

- qua*, Lat. pron. considered as.
quantum meruit, Lat. phr. as much as it deserved; used to indicate a form of action in which the plaintiff seeks to recover the value of services rendered.
quantum valebant, Lat. phr. as much as they were worth; used to indicate a form of action in which the plaintiff seeks to recover the value of materials furnished.

quasi contract, n. phr. a form of obligation analogous to that of contract in which the element of agreement is supplied by law.

quasi public, adj. phr. as if public; having public functions.

qui facit per alium facit per se, Lat. phr. he who acts through another, acts himself.

quoad, Lat. conj. as to.

quo warranto, Lat. phr. a proceeding by a sovereign to inquire by what authority an alleged right is exercised.

R

ratification, n. adoption of the act of another as one's own.

realty, n. real estate.

recoup, v. to offset.

recourse, (*indorsement without*), n. that form of indorsement whereby the indorser signifies his refusal to assume responsibility for the payment of a negotiable instrument.

referee, n. an officer appointed by the court for the hearing of a case.

remainderman, n. phr. one having a right to land upon the termination of a prior estate.

replevy, v. to bring an action (known as replevin) to recover possession of personal property unlawfully detained.

repudiate, v. to reject.

res, Lat. n. thing.

resile, v. to withdraw.

rescission, n. abrogation.

respondeat superior, Lat. phr. let the master answer.

respondent, n. defendant in an equity case.

S

scienter, adv. knowingly; often used as a noun to indicate knowledge.

seal, n. an impression upon wax or other substance used in certain forms of instruments to indicate the solemn assent of a party thereto. At the present time, the seal may, in many jurisdictions, be no more than a scroll.

seized (*seised*), p.p. possessed.

service of process, n. phr. delivery of a writ or other legal document by an authorized person for the purpose of giving official notice.

set-off, (*right of*), n. the right to enforce a countervailing claim against the other party to a suit.

- simul cum*, Lat. phr. at the same time with; used when additional parties are joined in an action.
- simulacrum*, n. image.
- socii*, Lat. partners.
- solvent*, adj. having an excess of assets over liabilities.
- specialty*, n. a contract under seal.
- specie*, (*in*), adj. phr. in coin; as applied to things, used to indicate identity.
- specific performance*, n. phr. literal execution of the terms of a contract ordered in certain cases by a court of equity.
- stare decisis*, (*doctrine of*), n. phr. that theory of law by which courts consider themselves bound to follow precedents.
- statu quo*, (*in*), Lat. phr. in the condition existing at a fixed prior time.
- statute*, n. legislative enactment.
- statute of frauds*, n. phr. that statute, originally English, which requires certain contracts to be evidenced in a specified way, generally in writing.
- statute of limitations*, n. phr. that statute which fixes the length of time within which suit must be brought upon a given cause of action.
- stoppage in transitu*, n. phr. the act by which an unpaid vendor stops the process of delivery of goods and resumes possession of them.
- subsequent*, (*condition*), adj. a condition referring to a future event, upon the occurrence of which a contractual obligation becomes no longer binding upon a party who chooses to avail himself of the condition.
- substantive law*, n. phr. that body of law which creates, defines and regulates rights; to be distinguished from adjective law, which prescribes the method of enforcing rights.
- sui generis*, Lat. phr. of its own kind.
- sui juris*, Lat. phr. of legal competency.
- suo vigore*, Lat. phr. of its own force.
- supra*, Lat. above referred to; over. *supra protest*, after protest.
- surplusage*, n. unnecessary matter.

T

- tantamount*, adj. equivalent.
- tender*, n. offer to perform.
- terminum*, Lat. limit; used to indicate the final day, upon which a defendant must appear or answer.
- testator*, n. a man who makes a will; fem. *testatrix*.
- title (to property)*, n. general ownership.

tort, n. a civil wrong, not arising out of a breach of contract or a breach of trust.

tortfeasor, n. phr. one who commits a tort.

tortious, adj. wrongful.

trespass, n. an unjustified invasion of the rights of a person, generally to property.

trover, n. an action for damages arising out of the wrongful exercise of dominion over property of another.

trust, n. a holding of property subject to a duty to employ it or to apply its proceeds in accordance with directions given by the person from whom it was received.

trustee, n. one whose duty it is to administer a trust.

turpitude, n. baseness.

U

ultra vires, Lat. phr. beyond the powers.

unilateral (contract), adj. a contract in which the obligation exists on one side only.

usury, n. agreement for a rate of interest greater than that allowed by law.

utile per inutile non vitiatur, Lat. phr. that which is valid is not rendered invalid by the incidental addition of invalid matter.

V

valid, adj. legally enforceable.

validity, n. legal enforceability.

vendee, n. purchaser.

vendor, n. seller.

vendor's lien, n. phr. the right of a seller to retain possession of property sold as security for the payment of the price.

virtute officii, Lat. phr. by virtue of his office.

vitiate, v. to render nugatory.

void, adj. having no legal effect.

voidable, adj. potentially of no legal effect.

voucher, n. receipt or release.

W

waive, v. to relinquish a right to enforce.

warrant, v. to guarantee; n. a legal instrument directed to a person in authority authorizing him to perform a certain act; also a form of receipt.

watered stock, n. phr. stock issued without corresponding increase of actual value.

writ, n. a precept in writing, issuing from a court of justice, requiring the appearance of a party or the doing of an act.

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